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A

Treatise on the Law of

VENDOR AND PURCHASER

OF

REAL ESTATE AND CHATTELS REAL.

INTENDED FOR THE USE OF

CONVEYANCERS

OF EITHER BRANCH OF THE PROFESSION.

BY

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THIRD EDITION.

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ASSISTED BY

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IN TWO VOLUMES.

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To the Memory of

MY FATHER AND MASTER IN THE LAW,

JOSHUA WILLIAMS,

SOMETIME ONE OF THE CONVEYANCING COUNSEL TO THE COURT OF CHANCERY, AND AFTERWARDS ONE OF HER LATE MAJESTY'S COUNSEL,

Whose wish it was that his Son should keep his name in Remembrance in Lincoln's Inn,

This Book

IS AFFECTIONATELY INSCRIBED.

PREFACE

TO THE THIRD EDITION.

In this edition all the changes in the law, which have taken effect since the publication of the last edition (*a*), have been incorporated in the text, some additions have been made, and the entire text has been carefully revised. The volumes have been again divided according to the treatment of the subject, which obtained in the first edition (*b*); the first volume dealing with the points, which may arise in the course of a contract for sale duly performed, and ending with the completion of the contract; and the second volume containing the discussion of the grounds for avoiding the contract (as mistake, misrepresentation, illegality, disability of a party, &c.), and of the rights and liabilities arising from a breach of the contract.

The cases on the question, when the acceptance of an offer with a reference to a formal agreement does or does not amount to a concluded contract, have been more fully stated in the notes (*c*), as this point so constantly recurs in practice. In this connection, we

(*a*) In 1911.

(*b*) See the Introduction to the first edition, below, pp. xiii *sq*. The chapter on the Death Duties, transposed for convenience in the second edition to the end of the second volume, has been retained in that place, but the Appendices of Forms have now been transferred to the first volume. In the second edition the first volume included the chapters on Mistake, Misrepresentation and Illegality.

(*c*) Pp. 17-19.

may note that the decision in *North* v. *Percival* (*d*), doubted in the two previous editions of this book (*e*), has now been disapproved of by the Court of Appeal (*f*). Some remarks are inserted (*g*) on the judgments in the late case of *Rawlings* v. *General Trading Co.* (*h*) as to the validity of a knock-out agreement between intending purchasers at an auction. Additions have been made in the chapter on the Usual Conditions of Sale with respect to certain Special Conditions of Sale (*i*), of which forms have been inserted in the Appendix (*k*); and alterations made with respect to the form of private contract snggested as desirable in the purchaser's interest (*l*).

As to the purchaser's right to require all documents falling within the period, for which title is to be shown, to be abstracted in chief, and to have all documents incorporated in the title by reference fully abstracted, it is respectfully maintained (*m*) that in these respects the decision in *Re Arran and Knowlesden and Creer's Contract* (*n*) was wrong.

The criticism contained in the last edition of this book (*o*) of the late Lord Parker's theory expounded in *Halkett* v. *Dudley* (*p*), that the purchaser's right to repudiate the contract at once on the vendor's failure to show a good title is a mere equitable right depending

(*d*) Kekewich, J., 1898, 2 Ch. 128.
(*e*) 1st ed. p. 17, n. (*j*); 2nd ed. p. 19, n. (*d*).
(*f*) In *Rossdale* v. *Denny*, 1921, 1 Ch. 57; see below, p. 19, n. (*l*).
(*g*) Below, pp. 26, 27, and notes (*k*, *l*).
(*h*) Shearman, J., 1920, 3 K. B. 30; C. A., 1921, 1 K. B. 635.
(*i*) Pp. 70-79.
(*k*) Appendix (A), General Conditions 7-9, 19, Special Conditions 14-25; below, pp. 703, 704, 707, 721-723.
(*l*) Pp. 81-87; Appendix (B), below, pp. 725-731.
(*m*) Pp. 104, 105, and notes (*l*, *m*).
(*n*) Warrington, J., 1912, 2 Ch. 141.
(*o*) 2nd ed. p. 186, note.
(*p*) Parker, J., 1907, 1 Ch. 590, 596.

on want of mutuality—a doctrine contradicted by five common law decisions not cited to him, two of which were of the Court of Appeal—has been maintained and amplified in the present edition (*q*); and it is respectfully submitted that the judgment in *Procter* v. *Pugh* (*r*), adopting this theory (but without any critical examination of it), was erroneous; and further, that the decision in that case was contrary to accepted authorities not cited therein and was wrong (*s*). As to the limits of the vendor's right to rescind the contract under the common condition in that behalf, the statement made in the last edition (*t*) of the law laid down in *Re Jackson and Haden's Contract* (*u*) and *Holliwell* v. *Seacombe* (*x*) was approved in *Re Milner and Organ's Contract* (*y*) and *Merrett* v. *Schuster* (*z*); and it is submitted that the true test is whether the vendor has made an innocent or a wrongful misrepresentation (*a*).

The correctness of the Irish decision in *Re Norwood and Blake's Contract* (*b*), that an administrator's power of sale of leaseholds may be well exercised for the purpose of dividing the estate among several next of kin, has been questioned (*c*).

The statement in the previous editions (*d*) of the law as to the acceptance of recitals framed to avoid

(*q*) Pp. 154-157, n. (*d*).
(*r*) Sargant, J., 1921, 2 Ch. 256.
(*s*) See pp. 59, n. (*y*), 153, n. (*u*), 156, n. (*d*), 174, n. (*m*), 175, n. (*p*).
(*t*) 2nd ed. p. 187 and n. (*n*).
(*u*) C. A., 1906, 1 Ch. 412.
(*x*) Kekewich, J., ibid. 426, 432 *sq.*
(*y*) Eve, J., 64 Sol. J. 463, 464.
(*z*) P. O. Lawrence, J., 1920, 2 Ch. 240, 248.
(*a*) See pp. 59, n. (*y*), 174, 175 and n. (*m*). All of the above points were more fully discussed in an article by the author in 66 Sol. J. 119, 135.
(*b*) 1917, 1 I. R. 472.
(*c*) Pp. 216, 217 and n. (*u*), 223.
(*d*) 1st ed. pp. 250, 251; 2nd ed. pp. 238-240.

notice of trusts, or inquiry into a *cestui-que-trust's* title, was cited with approval in *Re Chafer and Randall's Contract* (*e*), and further confirmed by the judgment in *Re Soden and Alexander's Contract* (*f*). The rule stated in this book (*g*) that trustees for sale must sell for *money* is maintained to be right (*h*), notwithstanding the *dictum* reported in *Re Sutton's Contract* (*i*) that "Consols are as good as cash." And the correctness of the statement in the previous editions (*k*) of the law as to the power of sale given by the Settled Land Acts being exerciseable by a tenant for life either under the original settlement, or the compound settlement, or some resettlement alone, has been upheld (*l*) by the decisions in *Re Constable's Settled Estates* (*m*) and *Re Cope and Wadland's Contract* (*n*); and the decision in *Re Cornwallis West and Munro's Contract* (*o*), asserted in the previous editions to be wrong (*p*), has been overruled (*q*).

The war legislation, though temporary in character, has left a permanent mark on the law of Vendor and Purchaser with respect to the title to land while such legislation was in force; and it has been found necessary not only to discuss the Courts (Emergency Powers) Acts (*r*) and the Increase of Rent and Mortgage Interest

(*e*) C. A., 1916, 2 Ch. 8, 12, 19.
(*f*) Sargant, J., 1918, 2 Ch. 258, 263, 264; see below, pp. 225 and n. (*d*), 227 and n. (*h*).
(*g*) 1st ed. p. 277; 2nd ed. p. 266.
(*h*) Below, p. 251 and n. (*i*).
(*i*) P. O. Lawrence, J., 65 Sol. J. 259.
(*k*) 1st ed. pp. 318-323; 2nd ed. pp. 311-315.
(*l*) See below, pp. 291-298.
(*m*) C. A., 1919, 1 Ch. 178.
(*n*) Sargant, J., 1919, 2 Ch. 376.
(*o*) Farwell, J., 1903, 2 Ch. 150.
(*p*) 1st ed. pp. 320, 321; 2nd ed. pp. 314, 315.
(*q*) See below, pp. 295 and n. (*o*), 296 and n. (*q*).
(*r*) Below, pp. 325-328.

(War Restrictions) Acts (*s*), but also to notice the Timber Orders (*t*).

In connection with the law of marshalling securities (*u*), a point has been mentioned (*x*), which has not yet been the subject of any reasoned decision, but which arose in the course of the author's practice, as to the proper time for ascertaining the respective values of two or more properties subject to some paramount charge to be apportioned between them.

In the section dealing with the law of restrictive covenants, the question has been discussed (*y*) whether the decisions in *Ives* v. *Brown* (*z*) and *Northbourne* v. *Johnston* (*a*) are consistent with the principles established by the cases of *Formby* v. *Barker* (*b*) and *London County Council* v. *Allen* (*c*). The author's criticism (*d*) of the decision in *Re Hollis' Hospital and Hague* (*e*) is maintained (*f*); although in *Re Costa* (*g*), Eve, J., purported to follow that decision. And it is respectfully submitted (*f*) that that learned judge was in error in supposing the gift over in *Re Costa* (which was to a stranger) to be "a true common law condition subsequent;" for under such a condition a right of entry can only be reserved to the donor and his heirs.

With regard to the execution of deeds by attorney, the question has been discussed whether, under the

(*s*) Below, pp. 328-334.
(*t*) Below, p. 55, n. (*c*), and Appendix (E), pp. 734 *sq.*
(*u*) Below, pp. 458-461.
(*x*) Below, p. 460, n. (*g*).
(*y*) Below, pp. 469, 470, n. (*y*), and *Addenda* thereto.
(*z*) Sargant, J., 1919, 2 Ch. 314.
(*a*) Sargant, J., 1922, 2 Ch. 309.
(*b*) C. A., 1903, 2 Ch. 539.
(*c*) C. A., 1914, 3 K. B. 642.
(*d*) 1st ed. p. 600, n. (*k*); 2nd ed. p. 678, n. (*s*).
(*e*) Byrne, J., 1899, 2 Ch. 540.
(*f*) Below, pp. 637, 638, n. (*m*). (*g*) 1912, 1 Ch. 337.

8th or 9th sections of the Conveyancing Act, 1882, the attorney is effectually empowered to convey, after his principal's death, the legal estate in lands then vested in the principal's personal representatives, heirs or devisees (*h*).

As the Law of Property Act, 1922 (*i*), lately passed, is not to come into operation until the 1st of January, 1925 (*k*), it is considered that, for the present, it is better not to introduce the provisions of that Act into the text at every point, in which they will effect a material alteration in the law, but to discuss them all together, after the present Law of Vendor and Purchaser has been fully dealt with, in a supplementary volume. The present law will remain material, after the commencement of that Act, not only with respect to the title to lands before the above date, but also as a necessary basis for comprehending the provisions of the Act. And it is thought that a complete statement of the Law of Vendor and Purchaser, as existing prior to that Act, will remain of permanent value. Besides this, the Act, in its present form, has been officially announced to be a temporary measure intended to be repealed, and to be replaced as to its enactments making independent changes in the law, by a new Act, and as to its provisions amending other statutes (such as the Settled Land Acts), by new Consolidation Acts. It is not impossible that during this process some amendments may be introduced—indeed Lord Birkenhead intimated as much in his final speech on the Bill in the House of Lords (*l*)—and in any case

(*h*) Below, pp. 110, 111, 689-692.
(*i*) Stat. 12 & 13 Geo. V. c. 16, passed 29th June, 1922.
(*k*) Sect. 191.
(*l*) See 66 Sol. J. 614.

the appropriate references to the new Acts will be wanted. It seems undesirable, therefore, to be constantly interrupting the statement of the present law in the text of this edition with discussions of the future law to come into operation in 1925, before the terms of such future law have been finally settled and the statutes declaring it actually passed. For these reasons it is proposed to treat of the provisions of this Act and the changes made thereby in a supplementary volume.

The entire work of correcting the press for this edition has been undertaken by the author's former pupil, Mr. H. Ernest Glaisyer, who is also responsible for the table of contents, and is engaged in preparing the tables of cases and statutes and the general index.

With the aid of the *Addenda*, this volume includes all relevant cases reported up to the date given below.

7, Stone Buildings, Lincoln's Inn,
2nd Nov. 1922.

INTRODUCTION

TO THE

FIRST VOLUME OF THE FIRST EDITION.

The writer can hardly put forward a treatise on the law of Vendor and Purchaser of Land without an apology for adventuring upon the field successively occupied by so eminent a Real Property lawyer as Lord St. Leonards, and a writer of such profound knowledge of conveyancing and great literary skill as Mr. Dart. His excuse is that so many years have elapsed and so many and great changes have been made in the law, not only since Mr. Dart first wrote, but even since he himself supervised an edition of his book, that there appears to be room for a re-statement of the principles of the law of sale of land from the standpoint of the present time. Such a statement of the law it has been the writer's aim to make; and he has particularly endeavoured to give a readable account of it.

This book is intended for the use of those engaged in the practice of conveyancing, whether as counsel or solicitors. Its design has therefore been to discuss the incidents of a contract for the sale of land as they are usually presented to the notice of conveyancers; that is to say, in order of time. And the scheme of the work is to treat first of the normal course of such a contract, where it has been made between persons of full capacity and is duly brought to completion, and to examine afterwards the grounds for avoiding the contract, such as incapacity, mistake, fraud or misrepresentation, and the remedies to be pursued in case of its breach. Thus the book begins with a statement of the law relating to the formation of a contract for the sale of land. It then gives a brief general account of the rights, obligations and remedies of the parties who have concluded such a contract; and the terms of an open contract

are particularly set out (*a*) in the same form in which the special provisions of a contract for sale are usually expressed. After this, the usual conditions of sale are dealt with; and the reader's attention is then directed to the vendor's obligation to show a good title and its discharge. The subject of the investigation of title is considered, first generally, and afterwards with regard to a variety of special points or subjects, all of which are of constant occurrence in the work of advising on title. In selecting the subjects to be so discussed and in determining upon their mode of treatment, the writer has necessarily had to take into account the exigencies of the law and practice at the present time; and he has often been constrained to deal at some length with topics which may be thought to be ephemeral, and which would be disposed of by a statement of very different proportion, if he could regard nothing else than the ideal form of a literary composition. Thus he has devoted the whole of one chapter to the subject of devolution on death, and the death duties (*b*), regarded from the conveyancer's point of view. But his reason is that on these subjects the law has been so lately recast by the Land Transfer Act, 1897, and the Finance Acts, that its interpretation has not yet been settled; whilst the questions which are raised by these statutes occur upon almost every title. At the end of the dissertations on particular points arising on the investigation of title, or on particular titles, the main thread of the discourse is again taken up in the chapter on the effect of the contract pending completion. This is followed by an account of the completion of the contract, dealing with the acts to be performed from the time of the acceptance of the title down to the execution of the conveyance.

At this point the first volume concludes (*c*), the reader having been conducted throughout the whole of the normal course of a contract for the sale of land. In the second volume it is proposed to treat of the parties' position after completion (as with regard to a want of title not ascertained until after that time) and with the avoidance of the contract and the remedies for the breach thereof, as already mentioned. The second volume will also include a chapter on the sale of registered land, a subject which would have been considered in the present volume, but for the delay in promulgating the new Land Transfer Rules.

The writer has not attempted to compile an encyclopædia of the

(*a*) Pp. 38 *sq.* (*b*) See above, p. v, n. (*b*).
(*c*) See above, p. v and n. (*b*).

law of sale of land. His object has been rather to treat of the main principles of the law and practice incident to such sales than to note every special circumstance which may possibly attend them. His belief is that a sound knowledge of these principles is by far the best aid to the solution of the particular problems which are encountered in practice. And his hope is that, in this respect, his book may be found a useful guide to those gentlemen who are obliged (as constantly happens in small transactions) to advise on difficult questions of conveyancing without the assistance of counsel.

Perhaps the writer may be allowed to say that he has not avoided the discussion of points of law or practice, which are not exactly covered by decided cases, or settled by the opinion of conveyancers or text writers of acknowledged eminence; nor has he hesitated to criticise judicial decisions or *dicta*, which appear to him to be of questionable authority. Thus, he has discussed the following amongst other questions:—Whether, after the acceptance of a bidding at an auction, either party can revoke the authority conferred by him upon the auctioneer to sign a memorandum of the contract (*d*); whether the purchaser's right to a good title is an implied term of the contract or a collateral right (*e*); whether a vendor under an open contract has the right of re-sale on the purchaser's failure to observe the terms of the contract (*f*); whether a voluntary conveyance is a good root of title under an open contract (*g*); at what time the purchase-money is payable on a sale of land situate in a compulsory registration district (*h*); and to what extent the usual remedies for securing payment of a rent-charge in fee are obnoxious to the rule against perpetuities (*i*). He has tried to elucidate the mystery of what is called "the compound settlement" in connection with sales under the Settled Land Acts (*k*), and he has respectfully protested (*l*) against the decision in the late case of *Re Cornwallis West and Munro's Contract* (*m*). He has likewise considered the important point—on which, he is aware, his is *vox clamantis in deserto*—whether a conveyance by a tenant for life under the Settled Land Acts can override a mortgage by the remainderman (*n*). And he has adverted to the difficulties

(*d*) P. 22, n. (*d*).
(*e*) P. 32, note.
(*f*) Pp. 48-50.
(*g*) P. 100.
(*h*) P. 371 and n. (*s*).
(*i*) Pp. 417, 418.
(*k*) Pp. 291 *sq.*
(*l*) P. 296, n. (*q*).
(*m*) 1903, 2 Ch. 150.
(*n*) See p. 299, n. (*m*).

now raised where a limited owner pays estate duty out of his own pocket and so becomes entitled to a charge for the amount paid (*o*); with regard to the charge of estate duty on the death of several joint mortgagees not appearing to be trustees (*p*); where a purchaser receives notice of some unregistered process of execution (*q*); and with regard to the effect of orders made in exercise of bankruptcy jurisdiction in creating a charge on land (*r*). He has suggested (*s*) that the assignee of part of land let on lease, who pays the rent for the whole under threat of distress, may have a remedy which was overlooked in the case of *Johnson* v. *Wild* (*t*). And he has criticised the decisions in *Bolton* v. *London School Board* (*u*), *Re Selous* (*x*), *Re Williams and Newcastle's Contract* (*y*) and the late case of *Re Highett and Bird's Contract* (*z*). Besides this, he has inquired into the advantages of official over private searches (*a*). He has made a strong effort to convince his readers of the great hardship which may befall a purchaser by private contract, whose advisers tamely submit to the incorporation in the contract of the conditions usual on London sales by auction (*b*). He has dealt with the subject of the investigation of title in view of a mortgage (*c*). And he has treated at some length of the law of restrictive covenants (*d*), a subject on which many important decisions have been given during the last few years, and on which the latest leading case (*e*) is of such recent date that it has not yet been reported in the Law Reports. He has moreover taken account, from the outset (*f*), of the additional burthen laid on conveyancers' shoulders by the development of the

(*o*) See Chap. XXI. § 3.
(*p*) Pp. 229-231.
(*q*) P. 552.
(*r*) P. 553.
(*s*) P. 351.
(*t*) 44 Ch. D. 146.
(*u*) 7 Ch. D. 766; below, p. 125, n. (*y*).
(*x*) 1901, 1 Ch. 921; see p. 444, n. (*z*), below.
(*y*) 1897, 2 Ch. 144; see p. 640, below.
(*z*) 1902, 2 Ch. 214; 1903, 1 Ch. 287; see p. 344, below.
(*a*) Pp. 570 *sq.*
(*b*) Pp. 79-87.
(*c*) P. 475.
(*d*) Pp. 467 *sq.*, 608, 624, 628, 632.
(*e*) *Formby* v. *Barker*, C. A. (July 14), 1903, W. N. 133; 72 L. J. Ch. 716; 51 W. R. 646.
(*f*) Pp. 37, 83, 189-192.

doctrine, which culminated (*g*) in the extraordinary case of *Scott* v. *Alvarez* (*h*).

It is hoped that this book may be useful, not only to practitioners but also to students preparing for conveyancing practice in either branch of the profession. With this object the author has endeavoured, throughout the work, to write in a manner intelligible to those who have no greater preliminary knowledge of the subject than an acquaintance with the elements of the law of real property and of contract. He may point out that the earlier part of his treatise (Chapters I.—V.), which gives a general account of the subject, is specially adapted to the use of students, and that it is designed to prepare them to understand the rest of the book, in which matters of interest to practitioners are more particularly dealt with. The writer has started with the assumption that his readers will at least have such an acquaintance with the law of real property as may be gathered from a text-book like "Williams on Real Property"; and he has not thought it necessary to repeat here descriptions of those parts of the law, which are explained in that book in an elementary way. Thus he has not inserted an account of the historical progress of the law of creditors' rights (*i*) as an introduction to his discourse about searches (*k*). But he has tried throughout so to treat his subject that readers may understand, who have no greater knowledge than this.

The writer is conscious of many imperfections in his treatise, and for these he must ask the indulgence of the profession. He has

(*g*) This doctrine appears to have originated with the case of *Best* v. *Hamand*, 1879, 12 Ch. D. 1; see Fry, Sp. Perf. § 1325, p. 592, 3rd ed.

(*h*) 1895, 1 Ch. 596; 2 Ch. 603. This case must have shattered the last ruins of the delusion that law and equity were fused by the Judicature Acts. It appears in truth to be equally destructive of the pretensions put forward by eminent judges (see p. 53, n. (*n*), below), that a contract is really construed in the same manner in equity as at law. In the days when the Courts of Common Law and Chancery were separate, the student's curiosity used to be stimulated by the statement that "on one side of Westminster Hall a man may succeed in his suit under circumstances in which he would undoubtedly be defeated on the other side" (Wms. Real Prop. 129, 1st ed.; 177, 13th ed.). But this apparent paradox is eclipsed by the judicial ruling that, in the same Court and cause and in a matter depending on the effect of the same stipulation in the same contract, a suitor may at the same time obtain and be denied substantial relief according as his claim is rested on the doctrines of equity or of law.

(*i*) See Wms. Real Prop. Chap. XI., 23rd ed.

(*k*) Below, p. 547.

been occupied with the task of its production for several years; but he has only been able to prosecute his undertaking during such time as he could spare from his other work. He will be much obliged if readers, who discover mistakes or omissions, will kindly inform him of them.

Mr. J. F. Iselin is responsible for the correction of the press, except as regards pp. 1—128; and he has undertaken the work of preparing the Index. He has also supplied the writer with many valuable notes for the preparation of Chapter XI., and is affording him the like assistance with regard to certain parts of the second volume. The author has endeavoured to make up for the absence of the Index from Vol. I. by using particular care in compiling the Table of Contents, and by inserting therein references to the pages under each heading.

7, Stone Buildings, Lincoln's Inn,
8th October, 1903.

TABLE OF CONTENTS.

PAGE

ABBREVIATIONS xliv

ADDENDA xlv

Chap. I.

OF THE FORMATION OF THE CONTRACT OF SALE.

PAGE

Sale defined 1
Requisites of a valid contract 1
Capacity 2
General capacity to buy or sell land 2
Exceptional cases reserved for future consideration 2
Expression of consent 2
Form 2
Consideration 3
Statute of Frauds requires signed writing 3
Written contracts may be formal or informal 3
The whole agreement must appear from the writing 4
Submission to or waiver of omitted term 4
Agreement to buy at reasonable price ..... 4, n.
Description of the parties 5
Description of the property 5
Plant v. *Bourne* 6
The memorandum may be made out by several documents 6
Rule as to connecting documents ... 6
Submission to or waiver of omitted term 7
The signature required 9
Signature of the party to be charged or his agent sufficient 10
Memorandum subsequent to the contract 10

PAGE

Cases where agreement enforceable without compliance with Statute of Frauds 10
1. Sale by Court 11
2. Where defence of statute not taken 11
3. Fraud 11
4. Part performance 12
Formation of contract, offer and acceptance 14
Communication 14
Acceptance must be absolute and identical with offer 14
Hyde v. *Wrench* 14
Revocation 14
Communication through the post ... 15
Time for acceptance 16
Negotiation of a contract for sale.. 16
Open contract 16
Promise to keep offer open 16
Offer to be accepted within a specified time 16
Agreement to extend time or take an acceptance made too late 16
Answering proposals as to sale 17
Acceptance subject to approval of title ..... 19, n.
The whole of the correspondence will be looked at 20
Oral agreement 20
Oral acceptance of written offer ... 20
Sale by auction 20
Auctioneer agent to sign 21

Chap. I.—*continued.*

PAGE

Auctioneer's clerk .....21, n.
Question of revocation of the authority to sign .....22, n.
Employment of a puffer at an auction 22
Inadvertent acceptance of bidding lower than reserve 24
Auctioneer's authority to sell without reserve 24
Liability of auctioneer advertising a sale without reserve 25
Liability of the owner advertising a sale without reserve 25
Advertisement of sale is not an offer 25
"Knock-out" agreement at auction. 26
Payment of a deposit 27
Forfeiture of deposit 27
Payment of deposit to auctioneer or to vendor's solicitor 28
Deposit on sales by private contract 28
Stamp on contract for sale of lands. 29
Alterations in the contract 30

Chap. II.

OF THE PARTIES' RIGHTS, OBLIGATIONS AND REMEDIES GENERALLY.

Conveyancers' duties on sales 31
Outline of the effect of the contract. 31
Abstract of title 32
Verification of abstract 32
Whether the right to a good title is an implied term of the contract or a collateral right .....32, n.
Vendor's duty to produce the land sold, to convey and give possession, to covenant for title and hand over title deeds 33, 34
Purchaser's duties 34
Proof of title 34
Requisitions and answers 34
Remedies for breach of the contract 35
1. Rescission and *restitutio in integrum* 35
2. Action for damages 35
Damages recoverable by vendor and purchaser ...35, 36
3. Action for specific performance 36
Unfairness 37
Hardship 37
4. Vendor and purchaser summons 37
Formal and informal memorandum of an open contract 38, 39
The fee simple sold, unless otherwise specified 39
Terms of an open contract 39
Vendor to show a good title 39
Delivery and verification of abstract 39
Proof of identity 39
Necessity of a good root of title ... 39
Proper evidence of title 40
Recitals in documents twenty years old 40
Inquiries as to earlier title 40
Vendor must produce a property identical with that described in the contract 40
Substantial errors to purchaser's detriment 41
Insubstantial errors 41
Errors to vendor's detriment 42
Verification of the abstract 42
Expense of evidence not in vendor's possession 43
Expense of stamping unstamped documents 43
Purchaser to accept the title, if shown to be good 43
Completion of the purchase 43
Delivery of or statutory acknowledgments, &c. as to muniments of title 44, 45
Time for carrying out the contract. 45
Rights of property and possession pending completion 46
Interest payable if completion delayed 47
Has vendor a right of re-sale without express stipulation? 48
Re-sale as owner after rescission or judgment 50
Re-sale after judgment in action for damages 50

Chap. III.

OF THE USUAL CONDITIONS OF SALE.

PAGE

Stipulations usually made on sales by auction 51
Reserving right to bid 51
Deposit; signing a memorandum... 52
Time for completion 52
Time when of the essence of the contract 53
Effect of fixing day for completion without further stipulation 54
Fixtures or timber to be taken at a valuation 55
What trees are timber .....55, n.
Maximum prices during war on sale of standing timber .....55, n.
Enforcing contract to sell at a valuation 55
Commencement of title 56
Limiting time for making requisitions 56
Purchaser should ask for abstract.. 58
Reservation to vendor of right to rescind the contract 58
Evidence of identity 59
Errors of description; compensation 60
Conveyance 61
Apportionment of rents and outgoings 61
Interest in case of delay in completion 61
Right to re-sell 62
Stipulations left to be implied in sales by auction 63
Form of conditions of sale by auction of freeholds in one lot... 64
Bidding; right to bid reserved 64
Deposit; contract to be signed 64
Fixtures and timber to be paid for at a valuation 64
Commencement of title 65
Time limit for making requisitions on title, &c. 65
Reservation to vendor of right to rescind the contract 65
Identity 66
No compensation for errors of description 66
Completion 66

PAGE

Rents, outgoings, &c. 67
Interest 67
Power of re-sale 67
Memorandum to be indorsed on the conditions 68
General condition on sale under a trust or power 69
Sale by mortgagee 69
Special conditions of sale 69
Title commencing with instrument not a good root of title 70
General devise 71
Voluntary conveyance 71
Sale of equity of redemption or property subject to easement or charge 71
Indemnity against defect of title... 71
Proof of facts stated in special conditions 71
Stipulations in certain particular cases 72
Insufficiently stamped documents.. 72
Unregistered documents 72
Estate duty on death of joint mortgagee 72
Death duties on deaths over twelve years old 72
Proof of constitution, &c. of building, friendly, &c. society, or company 73
Fire insurance 73
Exception of mines 73
Reservation of mining liberties and power to let down surface 73
Reservation of new easement 74
Land sold with benefit of existing easements or rights of common... 74
Sale free of tithe or land tax 74
Sale of leaseholds 74
Purchaser to have notice of contents of lease 74
Production of last receipt for rent conclusive evidence of performance of covenants 74, 75
Person giving receipt assumed to be reversioner 75
Notice of state of repair 75
Covenant of indemnity 75

Chap. III.—*continued.*

PAGE

Duplicate of conveyance 75
Sale of land held by underlease ... 76
Sale of leaseholds not assignable without landlord's licence 76
Sale of land subject to some rent or statutory charge 76, 77
Sale of land by auction in lots 77
Custody of title deeds 77
Sale of leaseholds in lots 78
Sale in lots of freeholds subject to a rent 78
Sale of land subject to restrictive covenants 78
Separate contract on sale of each lot 78
Purchaser to be entitled to one abstract only 78
Stipulations in formal contracts for private sale 79
Vendor's reasons for not desiring an open contract 80

PAGE

Points to be considered in settling a private contract 82
Deposit 82
Time for completion 84
Fixtures or timber at a valuation... 84
Commencement of title 84
Limiting time for making requisitions or objections 84
Reservation to vendor of right to rescind the contract 84
Expense of verification of the abstract 85
Evidence of identity 85
Compensation for errors of description 86
Conveyance 86
Apportionment of rents and outgoings 86
Interest in case of delay in completion 86
Re-sale 87

Chap. IV.

OF THE VENDOR'S OBLIGATION TO SHOW A GOOD TITLE AND ITS DISCHARGE.

§ 1. *Of the general nature of the proof required.*

Origin of the rule that the vendor must show a good title 88
Proof of sixty years' title *primâ facie* proof of a good title ...88, 89
Sixty years' title had to be shown, as a rule, in all cases 90
When earlier title could be required 90
1. Advowson 90
2. Long term 90
Contract to grant a lease..90, n.
3. Tithes or property held by Crown grant 91
4. Reversionary interest 91
Vendor and Purchaser Act, 1874.. 91
Forty years' title only now required 92
Title on purchase of leaseholds ... 92
Enfranchised copyholds .....92, and n.
The present law as to showing title 92

Freeholds or copyholds 93
Enfranchised copyholds 93
Leaseholds 93
Lease when intended to mean lease from the freeholder .....93, n.
Property held by underlease ....93, n.
Contract to grant a lease for years or underlease 94
Advowson 94
Tithes or property held by Crown grant 94
Reversionary interest 94
Best and the usual evidence of title is production of the title deeds 95
Other evidence of title 95
Title depending on Statute of Limitations 96
Vendor must produce the title deeds, if he can 97

§ 2. *Of the abstract of title.*

	PAGE
Vendor bound to make and deliver an abstract of title	97
What the abstract ought to contain	98
The abstract should commence with a good root of title	98
General devise	98
Conveyance of equity of redemption	98
Transfer of mortgage	98
Reason of the rule requiring a good root of title	99
Conveyance of equity of redemption	99
Deed exercising a power	99
Disentailing assurance	99, 100
Whether the abstract must commence with a conveyance for valuable consideration	100
Voluntary conveyance	100
Family settlement	100
Specific devise	100
Root of title where the time for showing title is curtailed by special stipulation	100
What documents should be abstracted after the root of title...	101, 102
The manner of making an abstract	103
What are material clauses	103
Covenants for title	103
Powers	104
Shifting clauses	104
Joint account clauses	104
Provisoes for redemption	104
Documents incorporated by reference	104
Documents recited in deeds 20 years old	104, n.
Execution of deeds, &c. should be stated	105
Tracing of maps or plans	106

§ 3. *Of the verification of the abstract.*

Vendor bound to verify the abstract	106
Expense of procuring evidence not in vendor's possession	107
Evidence required is (1) of documents, (2) of facts	107
Proof on sales differs from proof in litigation	107
Proof of documents in Court	107
Documents thirty years old	107
Attested documents	108
No evidence of the execution of any document required on sales	108
What is the strict right of a purchaser as to proof of execution of title deeds	109
Title deeds executed by attorney..	110
Documents may be in private or official custody	111
Vendor must produce evidence of documents in official custody ...	111
Expense of proving documents not in vendor's possession	112
Evidence of public document	112
Examined copy	112
Exemplification	112
Office copies	112
Certified copies	112
Proper place for verification of the abstract	113
Expense of examining title deeds not in vendor's possession	114
Deeds in possession of vendor's mortgagees, or other persons than vendor	114
Mortgagor's right of access to deeds in possession of mortgagee	114, 115
Mortgagor's right to redeem, on what terms exerciseable	115, n.
Where vendor has a mere right to production	116
Where vendor has a covenant for production	117
Solicitor's lien	117
Solicitor acting for vendor	117
Solicitor acting for both parties...	118
Lien of solicitor commensurate with client's right to hold the deeds	118
Stamps	119
Evidence of facts required on sales	120
Evidence that certain events, which would certainly have affected the title, did not happen	120, 121

Chap. IV. § 3—*continued.*

PAGE

Rule as to presumptions of fact... 122

Presumption of conveyance in case of trust to convey or simple trust .....122, n.

Whether trustee's legal estate can be barred by Statute of Limitations .....123, n.

Events of which the happening may or may not have affected the title 123

Expense of proof of facts 124

Recitals and statements in documents twenty years old 125

Criticism of *Bolton* v. *London School Board* .....125, n.

Recitals of documents forming part of the title prior to the time for commencing the abstract 126

Recitals no evidence, as a rule; exceptions 126

Documents recited in deeds twenty years old .....126, n.

Recital in a public statute or document 127

Recital in private Act .....127, n.

Statutory declarations 128

Recitals in deeds of other documents 128

When the document is lost 129

Recitals of fact do not excuse vendor from proof 129

Acceptance of irregular evidence.. 129

Indirect evidence of death or of payment of equitable charge ... 130

Great importance of verification of the abstract 131

And of the examination of the deeds with the abstract 131

Proof of identity of property 132

Evidence of particular matters ... 132

Acknowledgment 132

Act of Parliament 133

PAGE

Land Commissioners and Board of Agriculture .....133, n., 134, n.

Award of enfranchisement or inclosure 133, 134

Ministry of Agriculture and Fisheries .....134, n.

Bankruptcy 134, 135

Copyhold assurances 135

Courts, proceedings of 136

Office copies 136

Crown grants 137

Deeds 137

Missing documents 137

Enrolment 138

Exchange or partition, order of ... 139

Fine 139

Lease for a year 139

Pedigree, birth 139

Age, marriage, death 140

Presumption as between vendor and purchaser in matters of pedigree 141

No presumption of death 142

Presumption of death in litigation .....142, n.

Presumption of marriage; Legitimacy or paternity 143

Death in common calamity .....143, n.

Evidence in questions of non-intercourse between husband and wife .....144, n.

Proceedings under Legitimacy Declaration Act, 1858 .....144, n.

Bastards .....144, n.

Legitimation *per subsequens matrimonium* .....145, n.

Record in Record Office 145

Recovery 145

Registration in Middlesex or Yorkshire 146

Seisin 146

Will 147

Probate of wills of realty 147

Chap. V.

OF ADVISING ON TITLE GENERALLY.

PAGE

Duty of conveyancer advising the purchaser on title 149
What should be the general scope and result of the abstract 150
Vendor need not show the whole estate to be vested in himself, if he have the right to procure its conveyance 150
Vendor having power to convey... 150
Or entitled in equity, or under an uncompleted contract of purchase 150
Or subject to mortgages 151
Distinction between showing a good title on the abstract and proving it 151
Good title not shown, if any estate outstanding in one, whom the vendor has no right to direct to convey 152
Sale of land with vacant possession 153
Lake v. *Dean* .....153, n.
Re Bryant and Barningham's Contract 154
Purchaser must at once repudiate the contract if he wish to insist on this objection 154
Purchaser's right to repudiate is given by the common law ....154, n.
Criticism of Lord Parker's theory in *Halkett* v. *Dudley* .....155, n.
Proper time for showing title...156, n.
Nature of breach occasioned by failure to show title at the proper time .....156, n.
Requisitions as to the contents of and manner of making the abstract 158
Proviso for reconveyance 159
Estate of grantee to uses 160
Identity 161
Calling for evidence of facts 161
Death duties 162
Stamps 162

PAGE

Inquiries respecting the property sold 163
Tenants' claims for compensation under Agricultural Holdings Acts, 1908 to 1920 163
Rents not disclosed by contract ... 164
Freeholds subject to heriots ...164, n.
Sale free from land tax or tithe rent-charge .....164, n.
Statutory charges on land 165
Re Farrer and Gilbert's Contract. 166, n.
Future statutory burdens on land. 167
Agreement to complete without prejudice to some statutory liability 167
Vendor bound to answer all relevant questions 168
Re Ford and Hill 168
Course usually taken by counsel advising on title 168
Searches 169
Time for making requisitions 169
Failure to show any title on abstract 169
Want v. *Stallibrass* 169
Re Tanqueray-Willaume and Landau 170
Objection to matter of conveyance 170
What requisitions should be made and insisted on 171
Where the vendor may rescind ... 171
Where the vendor has no title 173
Obligation of the vendor to show a good title .....174, n.
Where the vendor has knowingly or recklessly made a material misrepresentation 174
Innocent misrepresentation 175
Objection as to matter of conveyance 175
Waiver of objections or requisitions 176
Purchaser desiring to go on where the abstract shows an objection to the title 178

Chap VI.

OF STIPULATIONS LIMITING THE OBLIGATION TO SHOW A GOOD TITLE.

PAGE

The statutory limitations 179
Sect. 3 (3) of Conveyancing Act, 1881 180
Its effect 181
Phillips v. *Caldcleugh* 181
Nottingham, &c. Co. v. *Butler* ... 182
Re Marsh and Earl Granville 183
Vendor disclosing a defect of title 184
Misrepresentation 184
Re Banister, Broad v. *Munton* ... 185
Construction of express stipulations before the Conveyancing Act, 1881 185
Special stipulations as to title 187
Hume v. *Bentley* 187
Purchase with notice that a good title cannot be made 188
Difference in purchaser's position when resisting specific performance and seeking to recover his deposit 189
Best v. *Hamand* 189
Re Davis to Cavey 190

PAGE

Re National Provincial Bank of England and Marsh 190
Re Scott and Alvarez's Contract... 191
Recovery of deposit under agreement that title shall commence with some specified instrument which turns out not to be a good root of title 192
Purchaser under usual condition as to identity requiring further evidence 194
Course to adopt in making requisitions 194
Conditions requiring assumptions of fact 194
Position of purchaser buying under special conditions as against persons claiming adversely to the vendor 195
Purchaser not investigating title has constructive notice of equities which he might have discovered by inquiry 195
But not of equities which he would not have so discovered 196

Chap. VII.

OF DEVOLUTION ON DEATH.

Devolution on death before 1898.. 197
Dower 197
Curtesy 198
Succession to freeholds after death before 1898 199
Escheat 199
Estates tail and *pur autre vie;* gavelkind and borough-English. 199
Copyholds, freebench and curtesy. 200
Devise of copyholds, customary heir, heirs of the body 200
Estate *pur autre vie* in copyholds. 201
Leaseholds, executors' power of disposition 201
Assent of executor to specific bequest of leaseholds 201
Equitable estates, dower out of ... 202
Trust or mortgage estates 202, 203
Land Transfer Act, 1875, s. 48 ... 203
Bare trustee .....203, n.
Vendor and Purchaser Act, 1874, ss. 4, 5 .....203, 204
Conveyancing Act, 1881, s. 30 ... 204
Copyholds 204
Devolution on intestacy 205
Liability of real estate to deceased owner's debts 205
Copyholds, estates tail, estates for life and *pur autre vie* 205
Equitable estates 206
Creditors' remedies, debts not a charge on the land 206

Chap. VII.—*continued.*

PAGE

Lands devised on trust to pay or charged with debts, legacies or annuities 206, 207
Effect of administration order registered as *lis pendens* 207
Executors formerly had no interest in their testator's real estate ... 208
Power for executors to sell real estate might be implied...208 and n.
Statutory powers for sale 209
Power of devisee in fee or tail of lands charged with debts to sell or mortgage 209
Inquiries on sale of leaseholds by executors .....210, n.
Inquiry if debts still unpaid 210
Administrators 210
Land Transfer Act, 1897 211
Real estate vests in personal representatives 211
Real estate appointed under power 211
Personal representatives trustees for the heir or devisee 211
Powers of personal representatives over real estate 212
Liability of real estate to deceased owner's debts 212
Personal representatives' assent to devise of real estate 212
Court may order them to convey... 213
Effect of the Act 213
Devolution of chattels and freeholds pending appointment of administrator .....213, n.
Re Pawley and London and Provincial Bank 214
Proving executors may now exercise statutory powers 214
Order of application of dead man's assets in payment of his debts... 214, n.
Retainer .....214, n.
Real estate vests in general (not special) executors 215

PAGE

Renunciation of probate 215
Disclaimer without renunciation of probate .....215. n.
Assent to devise of realty 215
Must all proving executors join in assenting? 216
They must all join in conveyance to heir or devisee 216
Assent express, implied or presumed 216
Puts an end to executors' powers of disposition 216
Powers available only to pay funeral or testamentary expenses and debts 216
Sale of leaseholds for division among next of kin 216
Inquiry by purchaser as to payment of debts 217
As to assent to devise 217
Notice that no debts remain unpaid 217
Conveyance to heir or devisee subject to charge 217
Assent to devise in settlement 217
Effect of sale by administrator when will afterwards found 218
Devolution of beneficial interest... 218
Dower 218
Legal contingent remainders since Land Transfer Act 218
Re Robson 219
Estates tail 220
Equitable estates 221
Copyholds, equitable estates in ... 221
Escheat to Crown 221
Whether personal representatives' powers paramount to estate duty and succession duty 222, 223
Succession duty on sale of leaseholds for division among next of kin 223
Question of sale of real estate for division amongst co-heiresses ... 223

Chap. VIII.

OF NOTICE OF TRUSTS AND SALES BY TRUSTEES.

§ 1. *Of notice of trusts.*

PAGE

Notice of a trust 224
Recitals framed to avoid notice of trusts 225
Stamp on transfer of mortgage to new trustees .....225, n.
Course taken on appointment of new trustees 225
Acceptance of statements intended to conceal the fact that mortgagees or owners are trustees... 226
Recitals of title in equity 226
Re Chafer and Randall 227
Re Soden and Alexander 227
Notice of a document disclosing the trust 227
Circumstances may make disclosure of a trust unavoidable 228
Succession and estate duty on death of one of several mortgagees not appearing to be trustees 228, 229
Inquiry as to succession and estate duty on death of joint tenant ... 231
Position of joint mortgagees when right to redeem is barred .....231, n.
Notice of a document, how far notice of its contents 232
Notice, actual or constructive 232
Restriction on constructive notice by sect. 3 of the Conveyancing Act, 1882 233

PAGE

Notice to agent 233
The previous law as to limited transactions 233
Effect of the Act 234
Re Cousins 234
Reason for the rule that notice to the agent is notice to the principal 234
The exception in case of fraud ... 235
The law previous to the Conveyancing Act, 1882 235
Kennedy v. *Green; Boursot* v. *Savage* 236
Atterbury v. *Wallis* 236
Bradley v. *Riches; Sharpe* v. *Foy*. 237
Cave v. *Cave* 237
Effect of the Conveyancing Act, 1882, s. 3 238
Taylor v. *London and County Bank* 238
Vendor or mortgagor acting as purchaser's or mortgagee's solicitor 239
What inquiries ought a purchaser to make? 239
Oliver v. *Hinton* 240
Notice that property is subject to charges or incumbrances 240
Jones v. *Williams* 240
Re Alms Corn Charity 241

§ 2. *Of sales by trustees.*

Sales by trustees 241
Trusts for or powers of sale 241
Trust for sale with all convenient speed 242
Time for exercising such a trust or power 242
Mills v. *Dugmore* 242
Acceleration of time for exercising a power or trust 243
Trusts for sale and settlement of the purchase-money 243
Election to take the property as real estate 244

Trusts for sale created by will ... 245
Power to postpone sale 245
Re Horsnaill 245
Trusts for sale now deemed to subsist until land conveyed to beneficiaries 245
Trusts declared by will for sale in order to pay testator's debts ... 246
Executor's power of sale under the Land Transfer Act, 1897 ... 246
Rule against perpetuities in connection with trusts for and powers of sale 247

Chap. VIII. § 2—*continued.*

PAGE

Order of the Court for administration of the trust 248
Duties of trustees for sale 248
Misdescription by trustees for sale 248
Powers given by Trustee Act, 1893, or by rules of Equity ..... 249 and n.
Trustees for sale must sell for money 251
Whether a trust for or power of sale authorizes a mortgage 252
Whether a trust or power to mortgage authorizes a sale, or a mortgage with power of sale.. 253
Sale of leaseholds by way of underlease 253
Timber and minerals 254
Sale by executors of surface apart from mines 254
Trustees should not sell at a valuation 254
Option of purchase 255
What persons, besides the original trustees, can exercise a trust for or power of sale 255
As to trusts or powers coupled with an interest 256
Survivorship of the trust 256
Disclaimer .....256 and n.
New trustees 256
Trustees appointed by the Court.. 257
Persons succeeding to the estate on the death of a sole or last surviving trustee 257
Powers given by Conveyancing Act, 1911 257
Practice before Conveyancing Act, 1881 258
Heir of sole or surviving trustee.. 258
Cooke v. *Crawford* 258
Devisee 258
Titley v. *Wolstenholme* 258
Personal representatives of sole or surviving trustee under Conveyancing Act, 1881 259
Under Conveyancing Act, 1911 260
Failure of devise of legal estate to trustee 260
Question in case of a devise by a sole trustee under the present law 260

PAGE

Re Burtt 261
Power without an interest 262
Survivorship of powers given to trustees 262
Survivorship of bare powers 262
General rule 262
Powers given to executors 262
Powers arising by implication of law 263
Powers given to trustees 263
Powers given to a class 263
Release and disclaimer of powers. 263
Power simply collateral 264
Bare power 264
Release of power, where a breach of trust 265
Exercise of a bare power by new trustees 265
By any others after the death of the original donees 265
Capacity of personal representatives of sole or surviving trustee 265
Trustees exercising a power conferred by a settlement for some purpose provided for in the Settled Land Acts 265
What are powers exerciseable for some purpose provided by the Act 266
Where two or more persons together constitute the tenant for life 268
Re Osborne and Brights, Ltd. 269
Re Morris' Settled Estates 269
Estate duty chargeable on land settled on trust for sale 270
Sale of land purchased in breach of trust 270
Sale of land purchased under power to invest settled personalty in purchase of land 270
Trustees' receipts 271
Purchase by trustees 272
What kind of property should be bought by trustees for persons entitled successively 273
What title trustees investing on mortgage should require .....273, n.
Valuation on behalf of trustees selling or purchasing 274
Title depending on past exercise of trust for or power of sale 274

Chap. IX.

of title under the exercise of powers.

§ 1. *Powers of appointment.*

PAGE

Title depending on exercise of a power of appointment 276
Conditions prescribed must be strictly observed 276
Execution of power by will or deed 277
Domicile of testator .....277, n.
Equitable relief against defective execution of a power 278
Title under a special power of appointment 279
Fraudulent execution 279
Remoteness of limitation 279
Power to appoint amongst unborn *issue* 280
Attestation clause to instruments exercising powers 280
Inquiry whether a power mentioned in the abstract has been exercised 281

§ 2. *Powers of sale under the Settled Land Acts.*

Sale under statutory power 281
Sales under the Settled Land Acts. 282
Sale and exchange of settled easement .....282, n.
Public Trustee .....282, n.
As to giving notice of intended sale 283
As to whether there are trustees of the settlement at the time of sale 284
Who are trustees for the purposes of the Settled Land Acts 286
Deposit on sale by auction of settled land 287
Forfeiture of deposit 287
As to the power of conveyance under the Settled Land Acts ... 287
What is "the settlement" 288
Re Ailesbury and Iveagh 288
Re Mundy and Roper's Contract... 289
Assignments of or charges on the life estate in consideration of marriage or by way of family arrangement 290
The compound settlement 291
Trustees of the compound settlement 291
Sale by tenant for life under the original settlement 291
Notwithstanding re-settlement 292
Re Wimborne and Browne; Re Constable's Settled Estates; Re Cope and Wadland .....293, n.
Sale under the compound settlement 294
Sale under the re-settlement 295
Principle to determine under what settlement one is tenant for life. 295
Criticism of *Re Cornwallis West and Munro's Contract* .....296, n.
The courses open to a tenant for life after a re-settlement 297
Sale by a tenant for life deriving his estate from the re-settlement alone 298
The exceptions to the tenant for life's power of conveyance 298
Estates, &c. having priority to the settlement 298
Estates, &c. conveyed or created for securing money actually raised 298
Re Dickin and Kelsall's Contract. 298
Mortgages by beneficiaries of their interests under the settlement... 299
Mortgage by a tenant for life or remainderman of his estate 299
Purchaser cannot require the concurrence of such mortgagees ... 299
Mortgage by the tenant for life and remainderman in fee 300
Mortgages by a remainderman alone 300
What mortgages come within the second exception 300

Chap. IX. § 2—*continued.*

PAGE

Purchaser must require the concurrence of all whose charges fall within the second exception 301
The third exception from the life tenant's power of conveyance... 301
Dispositions made by the tenant for life in exercise of the right of alienation incident to his ownership 301
Rights of an assignee for value of the life estate 302
Mortgages by the tenant for life of his life estate 302
Lease granted by the tenant for life at common law 303
Absolute assignment for value of the life tenant's estate 303
Assignments of the life estate in consideration of marriage or by way of family arrangement 303
Settlement and re-settlement limiting rentcharges in priority to the original life estate 303
Gratuitous assignment of the life estate 304
Release of the life estate 304
Bankruptcy of the tenant for life. 305

PAGE

Act of bankruptcy after the sale but before completion 305
Sale under the Settled Land Acts by a bankrupt tenant for life... 306
Trustee taking the life estate under a composition or scheme of arrangement 306
Purchaser should require evidence of the non-existence of estates, &c. which the tenant for life cannot convey 307
Practice as to abstracting the settlement on sales under the Settled Land Acts 308
The second and third exceptions relate to interests created before the date of the conveyance, not of the contract for sale 309
Dispositions of life estate after contract and before conveyance. 310
As to seeing that a tenant for life selling has not committed any breach of his duty as trustee ... 311
Stipulation that the purchaser shall pay the vendor's costs of the sale 312

§ 3. *Powers of sale under mortgages.*

Title depending on the exercise of a mortgagee's power of sale 313
Usual form of express power under old practice 313
Title under such power 314
Title under a mortgagee's statutory power of sale 315
Purchaser's protection under Conveyancing Acts, 1881 and 1911.. 315, 316
Waiver of any particular restriction on the exercise of a mortgagee's power of sale 317
Mortgagor's concurrence cannot be required 317
What estate the mortgagee can convey 317
Copyholds 318
Conveyance and contract should be in *professed* exercise of the power of sale 318, 319

Title under the power of sale given to mortgagees by Lord Cranworth's Act 319
Conveyance by mortgagee selling under Lord Cranworth's Act ... 319
Mortgagee selling under power of sale bound only to act in good faith 320
Sale by mortgagee at a valuation.. 320, n.
Kennedy v. *de Trafford* 321
Bailey v. *Barnes* 321
Sale by mortgagee in possession after mortgagor's title barred... 321
Sale after foreclosure absolute 322
Sale pending foreclosure or redemption proceedings 322
Sale by mortgagee's attorney 322
Re Dowson and Jenkins' Contract. 322
Sale by mortgagee of mines apart from surface 323

Chap. IX. § 3—*continued.*

PAGE

Fixtures and timber 324
Grant of easement over unsold part of mortgaged land 325
Restrictions on mortgagee's powers by Courts (Emergency Powers) Acts .....325—328
Renunciation of privilege given by statute .....327, n.
Restrictions on mortgagee's powers by Increase of Rent and Mortgage Interest (Restrictions) Acts 328—334 and notes
Purchase of foreclosed property... 334

Chap. X.

OF PARTICULAR TITLES.

§ 1. *Sale of copyholds.*

Legal estate in copyholds 335
Vendor's obligation 335
Fines payable by vendor 336
Sale under power in will or under Settled Land Acts 336
What fines due to lord 336
None on devolution of equitable estate 337
Fine payable by purchaser 337
Fine on admittance after death of unadmitted surrenderee 337
Devise by unadmitted surrenderee 338

§ 2. *Sale of leaseholds.*

Leaseholds 339
Lease from the freeholder must be shown unless otherwise agreed.. 339
Covenants more onerous than usual an objection to title unless disclosed 339
Evidence that a lease held subject to a condition of re-entry has not determined 340
Waiver of forfeiture by receipt of rent 341
Title to leaseholds where there is a continuing breach of covenant.. 342
Stipulation that last receipt for rent shall be conclusive evidence of performance of covenants ... 342
Lawrie v. *Lees* 342
Whose duty it is to perform covenants after a sale 343
Purchaser buying leaseholds with notice of a breach of covenant that cannot or will not be remedied 343
Criticism of *Re Highett and Bird's Contract* 344
Sale of land held by underlease... 346
Where covenants in head lease are more onerous than those in underlease 346
Where head lease comprises other land 346
Proof of performance of covenants in head lease 346
Sale of leaseholds not assignable without the landlord's licence... 348
Where landlord's consent not to be unreasonably withheld..348, n., 350
Sale of part of land held by lease for years 350
Sale of leaseholds in lots 352
Sale of renewable leaseholds 352
Sale of lease granted on surrender of prior lease 353
Satisfied terms 353
Proviso for cesser; merger 354
Surrender of term by trustees ... 354
Cesser under Satisfied Terms Act. 354
Merger at law and in equity 355
Purchase of fee by termor or of term by freeholder 356
Present law as to merger 356

Chap. X. § 2—*continued.*

	PAGE		PAGE
Enlargement of long term into fee simple	357	How far subject to rule against perpetuities	358
Leaseholds settled in trust to go with freeholds	357	Reversionary leases	359
Options to purchase contained in leases	358	Terms to commence *in futuro*	360
		Mann, Crossman and Paulin v. *Land Registry (Registrar)*	360

§ 3. *Sale of lands in a register county or compulsory registration district.*

Lands in Middlesex or Yorkshire.	361	Registered transfer or charge by purchaser before his own registration	372
Effect of an unregistered assurance	361	Successive purchases of several undivided shares	373
Wills	363	Conveyance on purchase of an undivided share alone	373
Yorkshire Registries Act, 1884	364	Purchase of undivided shares from different owners	373
Exceptions	365	Successive purchases of undivided shares from the owner of the entirety	374
Wills of leaseholds	366	Completion of a contract to buy the entirety by successive conveyances of undivided shares	375
Lands registered in the Land Registry	367	Suggested scheme for avoiding registration of title in a compulsory district	376, n.
Lands in a district where registration of title is compulsory on sale	367	Lands forming part of the Bedford Level	376
Leaseholds	369		
Term created for mortgage purposes	370		
Title deduced subsequently to occasion requiring registration	370		
First registration	371		
Sale of leaseholds in compulsory districts	372		
Priority notice in favour of purchaser's application for first registration	372		

§ 4. *Voluntary conveyances.*

In favour of a charity	376	Proof that a voluntary conveyance has not been avoided	378
Tending to defeat or delay creditors	376	Liability to estate duty after a voluntary conveyance	379
Bankruptcy within 2 or 10 years thereafter	377	Stamp duty on voluntary conveyances	380 and n.
Leaseholds	377		

§ 5. *Sale of ground rents, reversions and remainders, mines, roads, rivers, &c.*

Purchase of ground rents	381	Effect of grant of reversion on lessee's covenants and conditions	384, 385
Rack rent	381, n.	Rights given by the Conveyancing Act, 1881, as to covenants and conditions	386
Inquiries on purchase of the reversion on a lease	382		
Succession duty	383		
Reversion duty	383		

Chap. X. § 5—*continued.*

PAGE

Remedy given to the person entitled to the income of the land leased 386
Rights of assignee of reversion to sue for rent due before his time. 387
Rights of assignee of part of reversion 388
Effect of severance of reversion on a lease for years 389
Notice to quit where reversion has been severed 390
Stipulation precluding legal apportionment of rent 390
Notices to quit with a view to sale. 390
Reversions or remainders on an estate of freehold 391
Subject to exercise of the powers given by the Settled Land Acts. 391
Subject to succession and estate duty 392
Sale of reversionary interests at an undervalue 392
Time the essence of the contract on sale of reversion 392
Allotments under an Inclosure Act 393
Exchange effected by mutual conveyances 393
Exchange by order under the Inclosure Act, 1845 394
Sale of mines and minerals 395
Royal mines 395
What are minerals 395
Powers implied in an exception of mines and minerals 397
Surface cannot be let down without special power 397
Mines and minerals go with the surface until severed 398
Mines once severed remain distinct from the surface 399
Title to severed mines by adverse possession 399
Mines under copyholds 400
Soil of roads 400
Streets within an urban district... 402
Mines and minerals thereunder ... 402
Streets in the metropolis 402

PAGE

Public conveniences under roads in London 402
Main roads 402
Soil of rivers 403
Island in a river 403
Owner of several fishery presumed to be owner of the soil 404
Soil of tidal rivers 404
Public right of navigation 404
Sea-shore; foreshore 404
Several fishery over foreshore 405
Land below low watermark 405
Foreshore when a barrier against the sea 405
Land bounded by the sea-shore ... 405
Riparian owner's right of access to the sea 405
No public right to walk on the foreshore 405
Inland lake 405
Water rights in natural rivers 406
Surface or underground water not flowing in a defined channel 407
Water rights in artificial watercourses 407
Rights of fishing and sporting 408
Rights of fishing in tidal and non-tidal waters 408, 409
Severed from the ownership of the soil 409
Several fishery 409
Common of piscary 409
Right of sporting 410
Lessee's rights of fishing and sporting 410
Waste land of a manor 411
Approvement of part of a common 411
Right of lateral support 412
Sale of land with buildings or for building purposes 412
Support of buildings by buildings on adjoining land 413
Party walls 413
Boundary hedges and ditches 413
Undivided share in land 414
Tenant in common buying other shares 414
Title under trust for conversion ... 414

Chap. X.—*continued.*

§ 6. *Sale of purely incorporeal hereditaments.*

	PAGE
Sale of purely incorporeal hereditaments	415
Contract to grant an incorporeal hereditament *de novo*	416
Rent-charge	416
Perpetual rents, when redeemable.	416
Remedies of owners of rents	416
Covenant to pay a rent-charge	417
Proviso for re-entry on non-payment of rent-charge	417
Release of part of land subject to a rent-charge	418
Release of part of land subject to a rent seck	418
Registration of a rent-charge, where necessary	418
Land charges	419 and n.
Tithe rent-charge	420
Lands sold as tithe-free	420
Advowson	421
Benefices Act, 1898	422
Prohibition as to sales of advowsons by auction	424
Right of presentation pending completion of sale of an advowson	424
Devices formerly used on sale in expectation of a vacancy	424

§ 7. *Sale of charity lands.*

Points to be considered on purchase of charity lands	425
Requisites of the conveyance of land to charitable uses	426
Meaning of "assurance"	426, n.
Assurance by registered disposition under the Land Transfer Acts	427
Lease for years of land to a charity	427, n.
Enrolment of separate deed of trust	428
Power to enrol instruments not enrolled within due time	428
No power to amend other defects than want of enrolment	429
The assurance will be void though the charitable trusts be not disclosed	429
The charity may gain title under the Statutes of Limitation	429
To what interests in land the Mortmain and Charitable Uses Act extends	429
Assurance of personal estate to be laid out in purchase of land for a charity	430
Exemptions from the requirements of the Mortmain Acts	430
Investment of charity moneys on mortgage of land	432, n.
Gift of land by will to a charity	433
Construction of Consolidation and Codifying Acts	433, n.
Contract to sell land for the use of a charity	435
Restriction on the sale, mortgage, or leasing of charity lands	437
Dispositions of charity lands by authority of the Charity Commissioners	441
Assurance of lands purchased from a charity	441
Board of Education substituted for Charity Commissioners	443

§ 8. *Partnership property.*

Sale of land which is partnership property	443
Devolution on death of land which is partnership property	443
Criticism of *Re Selous*	444, n.
Persons to concur in disposition of land which is partnership property	445
Power of surviving partner to sell or mortgage the firm's lands	446

Chap. X.—*continued.*

§ 9. *Sale by order of the Court.*

PAGE

Title under an order for sale made by the Court 448
Jurisdiction of the Court to order a sale of land .....448 and n.
What interests are bound by an order for sale 449
Conveyance of the legal estate ... 450
The order should have been duly made, and must be properly carried out 451
Order of the Court not to be invalidated for want of jurisdiction 452

§ 10. *Sale of an equity of redemption.*

Risks on purchase of an equity of redemption 452
Prior equities, consolidation, tacking 453
What inquiries the purchaser should make 454
Notice to the mortgagee 454
Inquiries of vendor and of mortgagee 455
Purchaser's right of tacking 455
Equities of redemption of lands in Yorkshire 456
Purchaser of equity of redemption paying off the first mortgage ... 457
Keeping the charge on foot 457
Purchase by mortgagee of the equity of redemption 457
Marshalling securities 458, 459
Tacking 461
Interest now chargeable on a mortgage 462
Mortgage cannot be made irredeemable 462
Equity of redemption not to be clogged 462
Mortgages to moneylenders 463

§ 11. *Sale of licensed property.*

Obligations of vendor of licensed property 464
Time of essence of the contract ... 464
Compensation for non-renewal of licence 465
Compensation charge on licences.. 465
Effect of refusal to renew licence in case of a leasehold licensed house 466

§ 12. *Land subject to restrictive covenants.*

Restrictive covenants a defect of title 467
Statutory restriction 467
Devolution of the burthen of restrictive covenants 467
Formby v. *Barker* 468
Covenants to do some positive act on land 468
Criticism of *Milbourn* v. *Lyons* and *Ives* v. *Brown* .....469, n.
How restrictions on land may be created 470
Devolution of the benefit of restrictive covenants 472
Loss of right to enforce them 474
Title to benefit of restrictive covenants must be proved 475

§ 13. *Investigation of title in view of a mortgage.*

Intending mortgagee in a different position from purchaser 475
He should stipulate for payment of his costs in any event 475
Not an implied term of an agreement for a mortgage that mortgagor shall show a good title ... 476
Enforcement of contract to lend or borrow on mortgage 476
What title should be required on behalf of a mortgagee 477
Good marketable title 477
Evidence of title in view of a mortgage 478
Title on transfer of mortgage 478

Chap. XI.

OF THE EFFECT OF THE CONTRACT PENDING COMPLETION.

§ 1. *Of the rights and liabilities of the parties pending completion in respect of the property sold.*

PAGE

Effect of the contract in equity ... 480
Subject to vendor's duty to show title, his lien, and right to possession until the proper time for completion, the lands are the purchaser's .....480 *sq.*
Conversion 481
The vendor's trusteeship 481
Losses and improvements pending completion 482
Destruction by fire pending completion of a house insured by the vendor 483
Rights of the parties and the insurance office in respect of the policy 485
Purchaser should himself insure against fire 487
Vendor's duty to take care of the property sold 488
Repairs, &c. 488
Vendor not bound to improve the property 489
Damages for breach of contract ... 490
Vendor entitled to retain possession until actual completion 491
Vendor's liability to account for the rents 491
The vendor's beneficial interests pending completion 492

PAGE

Vendor's lien 492
His right to the profits 493
What profits he may take 493
He must not diminish the value of the inheritance 494
He may be restrained from disposing of the legal estate to the purchaser's prejudice 494
Vendor remaining in possession after the date fixed for completion 494
Outgoings, deterioration 495
Sale of land with business as going concern 496
Special conditions on sale of ....496, n.
Vendor's duty to discharge the outgoings 496
What outgoings he must discharge 496
Statutory charges 497
Purchaser's duty to discharge outgoings 498
Apportionment of outgoings 499
Purchaser taking possession before completion 499
Purchaser already in possession as vendor's tenant 500
Orders for purchaser in possession to pay price into Court or give up possession 501

§ 2. *Of the transfer pending completion of the rights and liabilities under the contract.*

Transfer pending completion of the rights and liabilities under the contract 502
Death of the vendor and devolution of his estate 503
Freeholds in fee 503
Estate tail 506
Sale by tenant in tail under the Settled Land Acts 506
Copyholds 507
Leaseholds 507

Conversion of the land sold in the vendor's hands 508
Option to purchase .....509 and n.
Conveyance of deceased vendor's estate by vesting order 510
When the Court may make a vesting order .....510, n.
Death of vendor who sold under a power 511
Contracts for the sale of settled land under the Settled Land Acts 512

Chap. XI. § 2—*continued.*

	PAGE
Devolution of the burthen of the contract on the vendor's death..	513
Death of the purchaser	513
Purchaser's heir or devisee now takes subject to the vendor's lien	515
Test of the property devolving as land on the purchaser's death...	515
Devolution of the burthen of the contract on the purchaser's death	516
Bankruptcy of either party to the contract	516
Bankruptcy of the vendor	518
Act of bankruptcy by the vendor.	519
Insolvent vendor when discharged from liability on the contract ...	521
Vendor an undischarged bankrupt at the time of the contract	522
Bankruptcy of tenant for life empowered to consent to a sale	523
Bankruptcy of the purchaser	523
Act of bankruptcy by the purchaser	524
Adjudication of bankruptcy against the purchaser	525
Insolvent purchaser when discharged from liability on the contract	527
Purchaser an undischarged bankrupt at the time of the contract.	527
Land taken in execution pending completion	528
Notice of unregistered process of execution	529
Lunacy	530
Marriage of either party to the contract	532
Conviction of treason or felony ...	533
Outlawry	534
Party becoming an alien enemy...	534
Assignment by a party to the contract	534
Assignment by the vendor of the land sold	534
To purchaser for value without notice	535
Tacking by vendor's alienee	536
Alienation by the purchaser of the land sold	537
Assignment of the benefit of the contract	537
Shaw v. *Foster*	538
As to the burthen of the contract after an assignment	538
Transfer of part of the benefit of the contract	539
Browne v. *London Necropolis Co.*	539
Contract specifically enforceable against persons whose estate would be displaced by a conveyance	540

Chap. XII.

of the completion of the contract.

§ 1. *Of completion generally.*

Time for completion	543
Where time of the essence of the contract	543
Making time of the essence, where not originally so, by subsequent notice	545
Time for performance by vendor of a condition which is a term of the sale	545
The acts to be performed on either side for completion	545
The purchaser's duties	546
Acceptance of the title	546
Searches and inquiries to be made by the purchaser	547
Acceptance of title by not sending in requisitions in time	547
Soper v. *Arnold*	547

Chap. XII.—*continued.*

§ 2. *Of searches and inquiries.*

PAGE

Searches, their object 547
Judgments, Crown debts and writs of execution 548
Writs and orders affecting land are void against purchasers for value unless registered 549
What the purchaser must now ascertain as to judgments, &c. .. 549
Land Charges Act, 1900 549
Judgments now operate as a charge when writ or order is registered 550
Ashburton v. *Nocton* 551
Judgments thought not to be a charge on lands conveyed before registration of writ or order...551, n.
Protection to purchasers of legal estate without notice of judgments affecting equitable estate not extendible by *elegit* .....551, n.
Notice of judgments or Crown debts of record or by specialty or public accountantship 551
Crown debts by simple contract... 552
Notice of unregistered process of execution 552
Orders made in exercise of bankruptcy jurisdiction 553
Annuities or rent-charges 554
Notice of life annuities 554
Land charges 555
Notice of unregistered land charges 555
Land improvement charges created before 1889 555
Land improvement charges not requiring registration before 1889 557
Statutory charges on land of a principal sum, not payable by way of annuity 558
What are land charges created after 1888 558
Lis pendens 559
Lands in Lancashire or Durham... 560
Bankruptcy 560
Deeds of arrangement 561
Disentailing assurances 562
Deeds acknowledged 562

PAGE

Search to ascertain if title is registered 562
Search in Middlesex and Yorkshire Registries 563
Copyholds 563
What searches should usually be made 563
1. Writs and orders affecting land 563
2. *Lis pendens* 563
3. Life annuities 563
4. Bankruptcy 564
5. Deeds of arrangement 564
6. For registration of title ... 564
7. Land charges 564
8. Middlesex or Yorkshire Registers 564
9. Court rolls 564
10. On purchase of land from a company .....565 and n.
Against what names searches should be made 566
Search in Yorkshire Registry...567, n.
No obligation on purchaser to search 569
Search is notice 569
Duty of purchaser's solicitor to search 569
Official searches 570
Official searches for disentailing deeds, and in the Yorkshire and Middlesex Registries 572
Inquiries to be made before completion 572
As to statutory charges 572
As to discharge of outgoings payable by the vendor 573
Ascertaining that possession is in accordance with the title 574
Inquiry of tenants and occupiers as to their interest 574
Inspection and survey of the property 575
Purchaser's rights before and after completion in respect of vendor's innocent misrepresentation 575
Purchaser buying without inspection must accept patent, but not latent defects 575, 576

Chap. XII.—*continued.*

§ 3. *Of the preparation of the conveyance.*

PAGE

Preparation of the conveyance ... 577
Who are necessary parties to the conveyance ... 577
Trust for or power of sale with the consent of some person ... 577
Sale under the Settled Land Acts. 578
Sale by order of the Court ... 578
Intermediate trustees ... 578
Incapacity of any party to the conveyance ... 579
Parties to the conveyance on the grantee's side ... 579
Conveyance to the purchaser's nominee ... 579
To his assignee of all his interest under the contract ... 579
Re-sale by purchaser before completion ... 580
Re-sale at an increased price ... 581
Form of the conveyance ... 581
Sale of lands subject to incumbrances ... 582
The usual stipulation as to the costs of conveyance ... 583
Discharge of incumbrances on sale by payment into Court ... 584
Vendor should never be allowed to obtain the legal estate ... 585
Manks v. *Whiteley* ...585, n.
Purchase followed by an immediate mortgage ... 587
Purchaser receiving notice of mesne incumbrances ... 588
Purchase of land in Yorkshire ... 590
Framing the conveyance ... 590
Recitals ... 590
Parcels ... 592
When is the purchaser entitled to a conveyance by reference to a plan? ... 593
Re Sparrow and James' Contract. 593
Re Sansom and Narbeth's Contract 594
Description independent of or by reference to a plan ... 595
Connecting a new description with the old ... 596
Mortgagees and trustees convey by the description under which they took ... 596

PAGE

Release by mortgagees of part of land ... 597
By trustee-mortgagees on receiving whole of price ... 598
Gratuitous release by mortgagees of part of security ... 598
By trustee-mortgagees ... 598
General words ... 599
Secondary meaning of appurtenances ...599, n.
What easements or other privileges the purchaser can require to be conveyed to him ... 600
Where vendor may limit the effect of the statutory general words.. 601
Whether purchaser may claim an express grant of an easement impliedly sold ... 602
Purchaser's right to require notice of easements, &c. over vendor's land to be indorsed on title deed 603
Reservations in the vendor's favour ...603, 604
Where the property is sold subject to some incumbrance ... 605
Effect of this as regards the statutory covenants for title ... 606
Sale of such estate as the vendor has ... 607
Vendor's qualified covenants for title confer no indemnity against eviction by title paramount 608
Sale of land subject to restrictive covenants ... 608
How far vendor may be bound by restrictive stipulations ... 609
Estate clause ... 609
Limitation of the purchaser's estate ... 610
Limitation of estate of grantee to uses ... 611
Limitation by deed of equitable estates in land ... 611
Vendor of land bound to give the usual covenants for title ... 612
No warranty of title now implied, as a rule, by the conveyance of land ... 613

Chap. XII. § 3—*continued.*

PAGE

False representation by vendor that he is the owner of the land sold 614
Sale by trustee as such 614
By mortgagee as such 614
By *cestui que trust* or mortgagor.. 615
By trustee in bankruptcy 615
Sale under power 615
Proviso restricting liability of tenant for life under covenants for title 615
Sale by trustees for sale 616
Sale by order of the Court 616
The statutory covenants for title.. 617
Their limitation or variation 618
Devolution of the benefit thereof. 618
Express covenants for title 618
Covenants for title on sale of an equitable estate 619
Covenants for title obtained by fraud 620
Purchaser may take either express or the statutory covenants for title 620
Covenants for title on sale of copyholds 621
Payment of price on sale of copyholds 622
Where the land sold is to be conveyed subject to any incumbrance 622
Covenants for title intended to cover an apparent defect 623
Purchaser agreeing to observance of restrictions on the use of the land bought must enter into an absolute covenant to that effect. 624
In what cases the purchaser is bound to indemnify the vendor. 624
On sale of leaseholds 625
Sale of *part* of land comprised in lease 627
Right of contribution 628
Indemnity on sale of land subject to restrictive covenants 628
Indemnity on sale of land subject to a charge for which the vendor will remain liable 630
Indemnity on sale of part of lands subject to a rent-charge 630
Right of contribution 631
Sale in consideration of a rent-charge 631

PAGE

To what remedies the vendor is entitled 631
Sale partly in consideration of an agreement by the purchaser to build 632
Whether the usual remedies for securing a rent-charge in fee are void for remoteness 633
Power of re-entry to satisfy arrears 633
Power to limit a term 634
Conveyancing Act, 1911, s. 6 635
Power of re-entry by way of forfeiture 636
Common law conditions of re-entry 636
Criticism of *Re Hollis' Hospital and Hague* .....637, n.
Power on breach of covenant to enter and hold until performance thereof 638
Delivery of title-deeds on completion 639
What documents must be handed over 639
Criticism of *Re Williams and Newcastle's Contract* 640
Vendor who has covenanted to produce the deeds 641
Vendor who has given a statutory acknowledgment and undertaking 641
Sale of land in lots 642
Solicitor's lien on the deeds 642
Vendor's duty to furnish statutory acknowledgments and undertakings 642
What documents should be included in a statutory acknowledgment 643
Statutory declarations 644
Where the purchaser will have the legal right to enforce an existing covenant or acknowledgment for production 645
How far a covenant to produce title-deeds runs with the land.. 645
Right to production of deeds relating to lands of several owners 645
Right to possession of deeds relating to lands of several owners..646, n.
Vendor must, as a rule, give both acknowledgment and undertaking 646

Chap. XII. § 3—*continued.*

PAGE

Exceptions, trustees and mortgagees 647
Proper acknowledgment and undertaking can only be given by the person retaining possession of the documents 647
Sale by mortgagor with mortgagee's concurrence 647
Person in constructive possession of documents 649
Acknowledgment, whether to be given by separate document 650
Endorsement of memorandum on conveyance 650
Expenses of acknowledgment and undertaking 651
Liability created by acknowledgment or undertaking 651
Endorsement of receipt on conveyance 651
Settling the conveyance 652
Conveyancing etiquette as to altering drafts 652
Engrossment 652
Stamps on conveyance 652
" Particulars delivered " stamp ... 653
Stamp duty on conveyances on sale 653
Meaning of conveyance on sale in Stamp Act, 1891 654
How *ad valorem* duty to be calculated in respect of stock and securities 655
How consideration consisting of periodical payments to be charged 655
How conveyance in consideration of a debt, &c. to be charged 655
Duty on conveyance in separate parcels of property sold for one consideration 656
On conveyance in separate parcels of property bought for one consideration by or for several persons 656
Where there are several instruments of conveyance for completing one sale 656
Sub-sale by purchaser before conveyance 656

PAGE

Conveyance in separate parcels after a sub-sale 656
Where sub-purchaser has taken a conveyance of the purchaser's interest 657
As to sale of annuity or right not before in existence 657
Conveyance by several instruments 657
Copyholds conveyed by deed or surrender 657
Sale of an equitable interest in lands 657
Of equity of redemption 657
Stamp duty on foreclosure order... 658
Vesting orders; Acts of Parliament 658
Timber, fixtures, goodwill 659
Conveyance in consideration of a rent-charge 659
Conveyance partly in consideration of improvement or covenant to improve 659
Where several transactions are carried out by one instrument... 660
Conveyance comprising sale and mortgage 660
Where incumbrances are got in by the conveyance 660
Release of interests not comprised in the sale 660
Incumbrances got in prior to conveyance 661
Acknowledgment or undertaking included in conveyance 661
Expense of stamping 661
Increment value duty 661
On wnat occasions was increment value duty payable .....662, n.
Definition of land, &c. in Finance Act of 1910 .....662, n.
Increment value duty stamps 663
Abolition of increment value duty. 663
Stamp on sale or grant of lease of separate tenement, part of larger building .....663, n.
Retention of delivery of particulars 664
Regulations as to delivery of particulars .....664, n.
" Particulars delivered " stamp ... 665
Vendor's duty in this respect 665

Chap. XII. § 3—*continued.*

PAGE

The purchaser's concern 666
Whether contract or conveyance should be stamped with the above stamp .....666 and n.
Where it seems advisable to stamp the contract 666
Conditions of sale as to "Particulars delivered" stamp 667

§ 4. *Of the adjustment of accounts.*

Apportionment of rent on completion 668
Of outgoings 668
Taxes on land .....669, n.
Mineral rights duty .....669, n.
Excess mineral rights duty .....669, n.
Outgoings which are not apportionable 670
Apportionment of land tax and tithe rent-charge 670
Sale of land subject to a rent attaching thereon and on other land 671
Sale of reversion of part of land let at one rent 671
Purchaser's liability to pay interest 671
Under an open contract 672
Under the stipulation usual on London sales 673
Contract to pay interest in case of delay from any cause 673
To pay interest except in case of vendor's wilful default 673
To pay except on vendor's default. 674
Purchaser in default to pay interest 675
Deduction of income tax 675
Items chargeable against or for vendor 675
Deterioration of the property 675
Compensation for errors of description 675
Claims to compensation under an open contract 676
The vendor's position at law and in equity 676
The vendor's right to specific performance with compensation 677
The purchaser's right to specific performance with compensation. 678
Exceptions 678
Condition excluding any right to compensation for errors of description 679
Condition allowing compensation; the vendor's rights 680
Re Fawcett and Holmes 680
The rule in *Flight* v. *Booth* 681
Extent of the condition for compensation 682
Debenham v. *Sawbridge* 682
Purchaser's rights under condition providing for compensation 683
Neither party can enforce specific performance with an indemnity. 684
Costs of the sale and of conveyance 685
Solicitors' Remuneration Act and Orders .....685, n.
Costs of concurrence of necessary parties other than the vendor ... 686
Where the vendor's interest has been transferred pending completion 687

§ 5. *Of the execution of the conveyance.*

Completion 688
Attestation of the conveyance by a witness of the purchaser's choosing 688
Vendor must convey in person ... 689
Power of attorney when revoked.. 689
Extension of power of attorney to donor's representatives after his death .....689, n.
Provisions of Conveyancing Act, 1882, as to powers of attorney... 690
Execution of the conveyance by attorney 692
Execution of some title deed by attorney 694
To whom the purchase money should be paid 694
Execution of Trusts (War Facilities) Acts .....694, n.

Chap. XII. § 5—*continued.*

	PAGE
Solicitor's authority to receive the purchase money on production of the conveyance	695
On a sale by trustees	695
Where the conveyance is executed by attorney	696
Payment should be made to the solicitor acting for the person entitled to give a receipt	696
Payment to solicitor ostensibly acting for a conveying party	697
King v. *Smith*	697
The deed must be produced at the time of payment	698
Payment to the solicitor's clerk	698
What is a proper payment	698
Effect of the execution of the conveyance	698

APPENDIX A.

FORM OF CONDITIONS OF SALE BY AUCTION OF FREEHOLD AND LEASEHOLD PROPERTY IN LOTS 701

SPECIAL CONDITIONS OF SALE 710

APPENDIX B.

FORM OF CONTRACT FOR PRIVATE SALE OF FREEHOLD LAND, WITH STIPULATIONS NOT SETTLED EXCLUSIVELY IN THE VENDOR'S INTEREST 725

APPENDIX C.

FORM OF INQUIRIES SUPPLEMENTAL TO REQUISITIONS ON TITLE 732

APPENDIX E.

SALES OF LAND, WITH TIMBER GROWING THEREON, DURING THE CONTINUANCE OF THE HOME GROWN TIMBER PRICES ORDER, 1918, AND THE TIMBER CONTROL ORDER, 1918 734

ABBREVIATIONS.

Dart V. & P. The 5th edition, the last revised by Mr. Dart himself, is cited as an authority, but references are given to the parallel passages in the 6th and 7th editions.

Fry Sp. Perf. Fry on Specific Performance. The 3rd edition, the last revised by Sir Edward Fry himself, is referred to; but the paragraphs cited have the same numbering in the 4th and 5th editions.

Sug. V. & P. The 14th edition is referred to.

ADDENDA.

Page 164, note (*n*).—Add a reference to *Dale* v. *Hatfield Chase Corporation,* 1922, 2 K. B. 282, 291, 295-298, 302.

Page 270, note (*ss*).—*Re Hone and Parker's Contract* is now reported, 1922, 2 Ch. 424.

Pages 292, note (*i*), 296, note (*q*).—This subject is further discussed in the judgment of Sargant, J., in *Re Meeking,* 1922, 2 Ch. 523, 532 *sq.*

Page 320, notes (*f, g, i*).—Add a reference to *Belton* v. *Bass, Ratcliffe & Gretton, Ltd.,* 1922, 2 Ch. 449, where a sale by a mortgagee of shares under his power of sale at a fair price was upheld, although the mortgagee advanced the whole of the price to the purchaser on a deposit of the share certificate.

Page 352, note (*c*).—*Gray* v. *Spyer,* on appeal, is now reported, 1922, 2 Ch. 22. The actual decision in that case was reversed, the C. A. considering that the agreement in question did not create a tenancy from year to year, but gave rise to a tenancy for one year with an option of renewal and further options to renew the renewed tenancy. But the law laid down by Younger, L. J., in the Court below, as stated in this book, was approved of by Lord Sterndale, M. R.

Page 358, note (*s*).—*Re Harcourt* has been affirmed in H. L., 1922, W. N. 265.

Pages 384, note (*n*), 387, note (*m*).—Add a reference to *Dale* v. *Hatfield Chase Corporation,* 1922, 2 K. B. 282, 293, 297, 302.

Page 390, note (*o*).—Add a reference to *Dale* v. *Hatfield Chase Corporation,* 1922, 2 K. B. 282, 291, 295-298, 302.

Page 406, note (*b*).—Add a reference to *Hulley* v. *Silversprings Bleaching Co., Ltd.,* 1922, 2 Ch. 268.

Page 467, note (*t*).—Add at end: "As to the right to a mandatory injunction on breach of a restrictive covenant where no damage is incurred by the breach, see *Sharp* v. *Harrison,* 1922, 1 Ch. 502."

Page 467, note (*u*).—Add at end: "And consider *Northbourne* v *Johnston,* 1922, 2 Ch. 309 (as to which, see *Addenda,* below)."

Pages 469, 470, note (*y*).—Add at end: "In *Northbourne* v. *Johnston*, Sargant, J., 1922, 2 Ch. 309, it was held that, where an estate is being developed as a building estate by the sale and conveyance of freehold plots of land subject to restrictive covenants entered into by the purchasers with the owners of the estate, their heirs and assigns, but without mentioning in the covenants with what land the benefit of the covenants was intended to run, an assignee of the unsold portion of the estate and also of the benefit of the covenants might enforce them against an assignee of one of the purchasers, on adducing extrinsic evidence that the entire property was being so developed and that the covenants were imposed with the object of preserving the general character and amenities of the whole estate, including the unsold portion thereof, as a building estate: see, 1922, 2 Ch. 319. It should be noted that in this case the plaintiff, apparently, did not contend that the property was subject to a building scheme, such as would make the benefit of the restrictions run with the unsold portions of the estate, without being expressly assigned therewith; he rested his claim on being an assignee of the unsold portions of the estate, and also, by express assignment, of the benefit of the covenants.

The covenants were originally entered into with the trustees of the estate. Afterwards, in 1884, those trustees conveyed the unsold portions of the estate to a *cestui-que-trust* entitled in fee simple; and in 1921 the representative of the last surviving trustee assigned to the devisee of that *cestui-que-trust* the benefit of the restrictive covenants entered into with the trustees; and thereupon the devisee brought the action claiming to enforce the covenants against the purchaser's assign. The principal defence was that the benefit of the restrictive covenants was severed from the ownership of the unsold portion of the estate by the conveyance of 1884 and could not be reunited thereto by the assignment of 1921. It was held, however, that after such assignment the devisee was perfectly entitled to sue upon the restrictive covenants. The learned judge pointed out that in equity the *cestui-que-trusts* of the unsold portion of the estate were entitled *ab initio* to the benefit of the restrictive covenants, which were entered into for their use and not for that of the trustees; and that, before the conveyance of 1884, the *cestui-que-trusts* could always have obliged the trustees to enforce the covenants for their benefit. The conveyance of 1884 made no difference in this respect; the trustees still remained trustees of the right to enforce the covenants for the benefit of the owners for the time being of the unsold portion of the estate, and bound to exercise that right for their benefit at their bidding. Hence the assignment in 1921 of the right to enforce the covenants merely transferred the legal right to sue thereon to the persons, who were already entitled in equity to the benefit of that right, and was therefore perfectly effectual.

It is respectfully submitted that there is an essential difference between this case and that of *Ives* v. *Brown*, 1919, 2 Ch. 314,

decided by the same learned judge; and further, that there is nothing in *Northbourne* v. *Johnston* to affect the author's criticism in the text of this book (pages 469, 470, note (*y*)) of the decision in *Ives* v. *Brown*.

In *Ives* v. *Brown* there was an actual severance of the benefit of the restrictive covenants from the ownership of the unsold land. It was held that the devise of the land did not pass the benefit of the restrictive covenants; and it was considered that the devisee's assign could, together with the covenantee's executors, enforce the covenants, not because the devisee, his heirs and assigns had been all along entitled in equity to their benefit and the executors had all along been bare trustees for them of the benefit thereof, but because the executors, as being the covenantee's personal representatives (*i.e.*, as representing his personal estate) had joined with the devisee's assign in the action. And it was held that the two together could enforce the covenants specifically, although neither of them alone had a good cause of action to do so. It was on this point that the author ventured to question the learned judge's decision in *Ives* v. *Brown*. And it is submitted that the decision in *Northbourne* v. *Johnston* is in favour of the distinction propounded in the note (*y*) to page 470, that where a devisee of the land, of which the enjoyment may be increased by the benefit of restrictive covenants entered into with the testator but not *expressed* to run with that land, is also entitled under the will to the benefit of the covenants, he can enforce them, at all events, against *the original covenantor*. In *Northbourne* v. *Johnston* the covenants were enforced against the covenantor's *assign*. It should be noted, however, that in that case an appeal was brought and compromised. And it may respectfully be doubted whether on this point the learned judge's decision was consistent with the principles laid down by the Court of Appeal in *Renals* v. *Cowlishaw*, 11 Ch. D. 866; *Formby* v. *Barker*, 1903, 2 Ch. 539; and *London County Council* v. *Allen*, 1914, 3 K. B. 642; see below, pages 467-474.

The questions at issue are these:—Can the burden of restrictive covenants be made to run with the covenantor's land, so as to be specifically enforceable against his *assigns* who were no parties to the covenants, if the *benefit* of the covenants be not definitely annexed *ab initio* to the ownership of some particular land of the covenantee? Can land in fact be bound in equity by restrictive covenants as a servient tenement, so that the owner thereof for the time being is obliged to observe the restrictions, merely because he *is* the owner and took with notice of the covenants, if there were not, at the time of the imposition of the restrictions, some definite dominant tenement of which the owner was to enjoy the advantage of the restrictions? And can the covenantor's *assign*, who is in no way liable on the covenants at law, be sued in equity for the specific performance of the covenants by one who is merely an assignee of the benefit of the covenants and is the owner, not

of land of the covenantee's, expressly or impliedly designated by the covenants to take the benefit thereof, but merely of land of the covenantee's being such that its enjoyment *might possibly* be increased by the enforcement of the covenants? It is submitted that the decisions of the Court of Appeal in *Renals* v. *Cowlishaw*, *Formby* v. *Barker* and *London County Council* v. *Allen* tend to the conclusion that these questions should be answered in the negative. These decisions and the whole question of the nature and incidence of restrictive covenants are no doubt open to review in the House of Lords: but the decisions are binding on Courts of first instance.

Some remarks were made in the judgment in *Northbourne* v. *Johnston*, 1922, 2 Ch. 318, 319, to the effect that it is unusual and sometimes impracticable to define in restrictive covenants the exact land, with which the benefit of the covenants is intended to run. It is, however, respectfully submitted that, as a matter of good conveyancing, this ought always to be done. If this point be attended to, then the trouble, expense and uncertainty of actions, such as form the authorities on the law of the enforcement of restrictive covenants (see below, pages 467-474), will be avoided.

The latest case on this subject is *Chambers* v. *Randall*, 1922, W. N. 282; but until the full report is published this decision cannot profitably be discussed."

Page 471, note (*b*).—Add at end: "*Northbourne* v. *Johnston*, 1922, 2 Ch. 309."

Page 473, note (*q*).—Add at end of first sentence: "*Northbourne* v. *Johnston*, 1922, 2 Ch. 309, as to which see above, *Addenda* to page 469, note (*y*).

Page 607, line 20.—Add a note: "The above passage was cited with approval by Sargant, J., in *Fowler* v. *Willis*, 1922, 2 Ch. 514, 517, where the law so laid down was applied to an option in a lease for the tenant to purchase all the estate, interest and title which was at the date of the lease vested in the landlord, and the landlord was then entitled to an equity of redemption only."

Page 680, note (*r*).—Add a reference to page 59, note (*y*).

THE LAW

RELATING TO

VENDOR AND PURCHASER OF LANDS.

CHAPTER I.

OF THE FORMATION OF THE CONTRACT OF SALE.

Sale defined.

THE subject of the present treatise is the sale of real estate and chattels real, or the formation and completion of contracts for the conveyance of land or other hereditaments in consideration of a price in money (*a*).

Requisites of a valid contract.

Now in order to create a valid contract, that is, an agreement enforceable at law, it appears that there must be:—

(1.) Due capacity to contract on the part of the persons entering into the agreement;

(2.) The expression by all parties of a common intention to create an obligation binding some or one of them; that is, an intention that some or one of them should do or forbear something affecting their legal relations for the benefit of the others or other of them;

(3.) Due compliance with the forms or the presence of other matter required to make a promise enforceable by English law, beyond the mere expression of a common intention;

(4.) Nothing unlawful in the object of the agreement;

(5.) True, full and free consent of the parties; that is, consent unimpeachable as having been induced through mistake, misrepresentation, fraud, duress or undue influence (*b*).

(*a*) See Wills, J., *J. & P. Coats* v. *Commissioners of Inland Revenue*, 1897, 1 Q. B. 778, 783; Stirling, J., *Payne* v. *Cork Co., Ltd.*, 1900, 1 Ch. 308, 314.

(*b*) Wms. Pers. Prop. 173, 17th ed.

Capacity.

Applying ourselves to the first of these elements of contract, it is to be observed that, in order to form a valid contract for the sale of land, the parties must have, not only capacity to make contracts generally but also due capacity to buy and sell land. As a general rule, all natural persons enjoy either capacity: but there are exceptions in the case of infants, persons of unsound mind, drunken persons, married women and convicts. Outlaws, too, and alien enemies are disabled by their incapacity for bringing actions from enforcing though not from making contracts (*c*). And corporations are limited in their capacity for buying and selling land (*d*). There are also cases in which the formation of an unimpeachable contract for the sale of land is prevented by the relation existing either between the vendor and purchaser, as in the instances of solicitor and client, trustee and *cestui que trust*, or between one party to the sale and the beneficial owner of the land or money dealt with, as where a man exercising a trust or power to sell or purchase land endeavours in the one case to buy the land himself, or in the other to sell his own land for the purpose (*e*). All these exceptional cases are reserved for subsequent consideration; and it is proposed first to examine the formation, incidents and usual course of a contract for sale of land made between persons of full contractual capacity; and to treat afterwards of any grounds for impeaching the contract. For the present therefore we will pass over the first, fourth and fifth of the above-mentioned elements of a valid contract, and devote our attention to the second and third, namely, the expression of consent, and its form.

General capacity to buy or sell land.

Exceptions—

—reserved for future consideration.

Expression of consent.

The common intention or consent of the parties to an agreement may be expressed either by their uniting in a set form of written or spoken words, or by the acceptance by some or one of them of an offer made to him or them by the others or other of them (*f*). As to the forms or other matter required to make a promise enforceable by English law beyond the mere expression of a common intention, the main rule is that the contract must be evidenced by deed or else there must be a consideration for

Form.

(*c*) Bac. Abr. Outlawry, D. (3), Aliens, D.; Co. Litt. 129 b. See below, Chap. XVI.

(*d*) See below, Chap. XVI.

(*e*) See below, Chap. XVII.

(*f*) Wms. Pers. Prop. 175, 17th ed.

the promise (*g*). In contracts for the sale of land the element of consideration is always present. The promise on the vendor's part to convey the land to the purchaser is made in consideration of the purchaser's promise to pay the price, and *vice versâ*. So that a contract for sale of land, though it be not made by deed, fulfils the requirements of English law, in so far as consideration is essential to its validity. A contract for sale of land is however one of those contracts on which the law imposes a requisite of form besides the element of consideration. For by the fourth section of the Statute of Frauds (*h*), no action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person by him thereunto lawfully authorized. So that *writing* and *signature by the party to be charged or his agent* are necessary to make a contract for the sale of land enforceable at law (*i*).

Written contracts may be formal—

Contracts for the sale of land are generally concluded, on a sale by private treaty, by the signature by both parties or their agents of a formal written contract; and on a sale by auction, by the purchaser or his agent signing a memorandum embodying formal conditions of sale, which the auctioneer also signs as agent for the vendor. But such contracts may also be established by informal written memoranda or letters signed by the party to be charged therewith or his agent. So that a binding contract may result from the acceptance in writing duly signed of an offer to sell land. It is essential, however, whether the writing given in evidence be of a formal or an informal nature, that the terms of the agreement sought to be

or informal.

(*g*) Ibid. 177.

(*h*) Stat. 29 Car. II. c. 3.

(*i*) The writing required by the fourth section of the Statute of Frauds need not be executed with pen and ink; the note of the agreement may be made in pencil or print, by engraving, lithography or photography, or "in any other mode of representing or reproducing visible words." And the signature of the party to be charged or his agent may be affixed by any similar means. See *Schneider* v. *Norris*, 2 M. & S. 286; *Geary* v. *Physic*, 5 B. & C. 234; *Bennett* v. *Brumfitt*, L. R. 3 C. P. 28; *Dench* v. *Dench*, 2 P. D. 60; *Tourret* v. *Cripps*, 48 L. J. N. S. Ch. 567; stat. 52 & 53 Vict. c. 63, s. 20.

But the whole agreement must appear from the writing.

proved thereby should be sufficiently ascertained therein (*j*). The parties to the contract (*k*) and the property to be sold must therefore be sufficiently described (*l*), and the price, or the means of ascertaining it, be stated (*m*); and any other terms of the bargain (except, of course, such as are implied by law, as that a good title shall be shown (*n*)) must be defined (*o*).

Submission to or waiver of omitted term.

It appears, however, that if a stipulation, which is to the detriment or for the benefit of one of the parties exclusively, be omitted from the memorandum, that party may submit to

(*j*) *Seagood* v. *Meale,* Prec. Ch. 560; *Wain* v. *Warlters,* 5 East, 10; *Blagden* v. *Bradbear,* 12 Ves. 466, 471; *Dewar* v. *Mintoft,* 1912, 2 K. B. 373, 384, 385.

(*k*) *Williams* v. *Lake,* 2 E. & E. 349; *Keen* v. *Mear,* 1920, 2 Ch. 574, 581. The parties must be so described as to show that they are the vendor and purchaser respectively: *Dewar* v. *Mintoft,* 1912, 2 K. B. 373, 384, 385.

(*l*) *Kennedy* v. *Lee,* 3 Mer. 441, 451. See next paragraph.

Semble, no agreement implied, on sale of land, to buy at a reasonable price.

(*m*) *Milnes* v. *Gery,* 14 Ves. 400; *Elmore* v. *Kingscote,* 5 B. & C. 583, 584; *Morgan* v. *Milman,* 3 De G., M. & G. 24. It is thought that the rule applying to the sale of goods, that in the absence of express agreement as to the price the law implies an agreement to buy at a reasonable price (*Hoadley* v. *McLaine,* 10 Bing. 482, 487; *Joyce* v. *Swann,* 17 C. B. N. S. 84, 102; stat. 56 & 57 Vict. c. 71, s. 8 (2)), has no application to the sale of land. This rule appears to have been laid down with respect to commodities so regularly sold that the market or the usual price is easily ascertainable. With regard to land, the law of specific performance of contracts to sell it is founded on the principle that the advantage of the possession of a particular piece of land may be inestimable, and no amount of money may be assessable as an exact equivalent for it; *Adderley* v. *Dixon,* 1 S. & S. 607, 610; *Falcke* v. *Gray,* 4 Drew. 651, 657; *Hexter* v. *Pearce,* 1900, 1 Ch. 341, 346; see below, Chap. XIX. s. 3. An express agreement to buy land at its fair value is, however, valid, and would, it seems, be specifically enforced; Grant, M. R., *Milnes* v. *Gery,* 14 Ves. 400, 407; Cranworth, C., *Morgan* v. *Milman,* 3 De G., M. & G. 24, 34; Sug. V. & P. 287. And an agreement to buy at the fair value of the land may be inferred from the terms of the memorandum; see *Gregory* v. *Migheil,* 18 Ves. 328, 333, 334; *Gourlay* v. *Somerset,* 19 Ves. 429, 431. But it is submitted that, if the memorandum do not specify the price or the means of ascertaining it, and contain no evidence of an intention to sell at a fair price, it is insufficient to prove a contract of sale. It is quite clear that, where the price is in fact agreed upon, it must be mentioned in the memorandum; *Elmore* v. *Kingscote,* ubi sup.; *Re Kharaskhoma, &c. Syndicate,* 1897, 2 Ch. 451, 464, 467. Where the parties intend that a particular piece of land shall be the object of an agreement of sale between them, but have not determined whether the price shall be (1) a definite sum of money, or (2) a sum to be ascertained in some specified manner, or (3) a sum equivalent to the fair value of the land, it is thought that their agreement as to the sale rests incomplete, and does not amount to a contract legally enforceable.

(*n*) See *Fowle* v. *Freeman,* 9 Ves. 351.

(*o*) *Cooper* v. *Hood,* 26 Beav. 293; *Van Praagh* v. *Everidge,* 1903, 1 Ch. 434; and consider *North* v. *Loomes,* 1919, 1 Ch. 378.

perform it or waive the benefit of it (as the case may require), and may with such submission or waiver enforce the contract as stated in the memorandum (*p*).

Description of the parties.

With regard to the question, What is a sufficient description of the parties to the contract, or the property to be sold? the rule is *id certum est quod certum reddi potest* (*q*). Thus a man may be sufficiently identified by reference to some character which he fills, if there can be but one answer to the inquiry, To whom does the description apply (*r*)? So that the description of the vendor as a proprietor, owner or mortgagee of certain land is good enough (*s*). But if the description be so vague that it does not necessarily apply to some particular person, it is insufficient. Thus it is not enough to describe the party to a contract of sale as the vendor of certain property, or as the client or friend of a named agent (*t*).

Description of the property.

The same general rule is applied in determining the sufficiency of the description of the property sold, parol evidence being admissible in either case to elucidate the description (*u*). Thus in a written agreement for the sale of Mr. Ogilvie's house (*x*), or Trogues Farm (*y*), or the Ashford Hall Estate (*z*), or of the property sold on a day specified at the Sun Inn, Pinxton (*a*), the land sold is ascertained with sufficient certainty to make the contract valid and enforceable; and it may be shown by oral evidence what land in fact answers to each particular description. So also "*the* property in Cable Street" has been admitted to be equivalent to all the vendor's property in Cable

(*p*) *Martin* v. *Pycroft*, 2 De G., M. & G. 785; Younger, J., *North* v. *Loomes*, 1919, 1 Ch. 378, 385, 386.

(*q*) *Rossiter* v. *Miller*, 3 App. Cas. 1124, 1141.

(*r*) *Potter* v. *Duffield*, L. R. 18 Eq. 4, 7; *Carr* v. *Lynch*, 1900, 1 Ch. 613; *Stokes* v. *Whicher*, 1920, 1 Ch. 411, 420—422.

(*s*) *Sale* v. *Lambert*, L. R. 18 Eq. 1; *Rossiter* v. *Miller*, ubi sup. So the descriptions "the executors of A." (*Hood* v. *Lord Barrington*, L. R. 6 Eq. 218), "a trustee for sale of certain property" (*Catling* v. *King*, 5 Ch. D. 660) have been held sufficient. See also *Commins* v. *Scott*, L. R. 20 Eq. 11; *Stokes* v. *Whicher*, ubi sup.

(*t*) *Potter* v. *Duffield*, ubi sup.; *Jarrett* v. *Hunter*, 34 Ch. D. 182; *Lavery* v. *Pursell*, 39 Ch. D. 508, 518; *Lovesy* v. *Palmer*, 1916, 2 Ch. 233, 238—241.

(*u*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Shardlow* v. *Cotterell*, 20 Ch. D. 90, 98; *Plant* v. *Bourne*, 1897, 2 Ch. 281.

(*x*) *Ogilvie* v. *Foljambe*, 3 Mer. 53, 61.

(*y*) *Goodtitle* d. *Radford* v. *Southern*, 1 M. & S. 299.

(*z*) *Ricketts* v. *Turquand*, 1 H. L. C. 472, 487, 493.

(*a*) *Shardlow* v. *Cotterell*, 20 Ch. D. 90.

Plant v. *Bourne.*

Street, and so sufficient to uphold the memorandum (*b*). And it has even been held that a memorandum of sale between two persons named at a price specified of "twenty-four acres of land at Totmonslow" contained a description sufficiently ascertaining the land sold to satisfy the Statute of Frauds (*c*). It has also been decided that a written receipt for 10*l.* received of Mr. Auerbach "on account of house being sold for 500*l.* from Mr. Nelson" sufficiently identified the property sold and the purchaser (*d*).

Memorandum may be made out by several documents.

Rule as to connecting documents.

The memorandum required by the Statute of Frauds need not be contained in one document; it may be made out from several documents, if they can be connected together. It was formerly laid down that, in order to connect two documents together so as to establish a sufficient memorandum to satisfy

(*b*) *Bleakley* v. *Smith,* 11 Sim. 150, where note that the only question argued and determined was as to the sufficiency of the vendor's signature.

(*c*) *Plant* v. *Bourne,* C. A., reversing Byrne, J., 1897, 2 Ch. 281. In that case the quantity mentioned was all the land the vendor had there, and he had shown the purchaser over it just before the contract was signed. The C. A. admitted oral evidence of these facts on the ground that the description in the memorandum must be taken to mean *the vendor's* 24 acres or those *so pointed out by him.* Byrne, J., had excluded this evidence because the memorandum did not say so, though he would have admitted the evidence if the description had been *the* 24 acres, &c. *Quære,* whether in principle the judgment of Byrne, J., were not sounder than those delivered in the Court of Appeal, where the Lords Justices appear to have adopted as the rule of law, not the *decision* in *Ogilvie* v. *Foljambe* (3 Mer. 53), that "Mr. Ogilvie's house" was a description sufficiently certain to allow of its being elucidated by parol evidence, but the *dictum* of Grant, M. R., that "the subject-matter of the agreement is left indeed to be ascertained by parol evidence, and for that purpose, such evidence may be received"; see 1897, 2 Ch. 287, 289. This *dictum* was of course uttered purely with reference to ascertaining what house answered to the description of Mr. Ogilvie's house. But, surely, apart from this, it is not the law that a written memorandum of a contract is sufficient to satisfy the Statute of Frauds, although the subject-matter of the agreement is left to be ascertained by parol evidence; see cases cited above, p. 4, nn. (*j*), (*o*). It is respectfully submitted that the actual decision of the Court of Appeal may be supported on the ground that a sale of 24 acres of land at Totmonslow would be a valid sale of 24 acres of land to be selected by the purchaser out of the vendor's land there; Shepp. Touch. 251; *Tapley* v. *Eagleton,* 12 Ch. D. 683; and that being so, it was competent to the vendor to prove that the purchaser had made his selection before the memorandum of the contract was signed; see *Wylson* v. *Dunn,* 34 Ch. D. 569.

(*d*) *Auerbach* v. *Nelson,* 1919, 2 Ch. 383. This case was so decided on the authority of *Shardlow* v. *Cotterell* and *Plant* v. *Bourne,* ubi sup.: but it seems obvious from the terms of the memorandum that the contract was for the sale of Mr. Nelson's house; see above, n. (*c*).

the Statute of Frauds, one must contain some reference to the other (*e*). But later cases have established a wider rule, which appears to be this:—You are entitled to explain by parol evidence the meaning of any general expression used in any document (*f*). If therefore you have a document, signed by a party to be charged, which refers to an agreement made by him, but in such terms that the description of the agreement is obviously incomplete, you are entitled to give evidence to show what that agreement is, and if the evidence so adduced comprise another document containing all the terms of the agreement, or the terms not specified in the first document, the two documents may be read together as a memorandum sufficient to satisfy the Statute, although the evidence connecting them be parol evidence only (*g*). But if a signed document contain a reference to an agreement made by the signer in such terms that a complete agreement is described, and no explanation of the terms of the document is required on the face of it, the party seeking to charge the signer is not entitled to give parol evidence that the agreement is other than is described, although the signer may prove by parol evidence that the agreement described in the writing does not contain some term of the agreement into which he entered, and so avoid the contract under the Statute of Frauds (*h*). This rule is, however, subject to the qualification above mentioned that, where the term omitted is to the detriment or for the benefit of one of the parties exclusively, he may submit to perform it or waive the benefit of it (as the case may require), and may with such submission or waiver enforce the contract set out in the written agreement (*i*). To

Submission to or waiver of omitted term.

(*e*) *Ridgway* v. *Wharton*, 3 De G., M. & G. 677, 693-7, per Cranworth, C., who changed his mind, *S. C.*, 6 H. L. C. 238, 256: dissenting judgment of Williams, J., *N. Staffordshire Ry.* v. *Peek*, E., B. & E. 986, 1000-3.

(*f*) *Bainbridge* v. *Wade*, 16 Q. B. 89.

(*g*) *Ridgway* v. *Wharton*, 6 H. L. C. 238; *Baumann* v. *James*, L. R. 3 Ch. 508; *Long* v. *Millar*, 4 C. P. D. 450; *Shardlow* v. *Cotterell*, 20 Ch. D. 90; *Studds* v. *Watson*, 28 Ch. D. 305; *Wylson* v. *Dunn*, 34 Ch. D. 569, 574, 575; *Oliver* v. *Hunting*, 44 Ch. D. 205; *Sheers* v. *Thimbleby*, 13 Times L. R. 451; *Dewar* v. *Mintoft*, 1912, 2 K. B. 373, where a sufficient memorandum was made out from letters *repudiating* the contract, but referring to the particulars, which were one document with the conditions of sale; *Daniels* v. *Trefusis*, 1914, 1 Ch. 788; *Stokes* v. *Whicher*, 1920, 1 Ch. 411.

(*h*) *Hinde* v. *Whitehouse*, 7 East, 558, 569, 570; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Rishton* v. *Whatmore*, 8 Ch. D. 467.

(*i*) Above, pp. 4, 5, and n. (*p*).

give examples:—Parol evidence has been admitted to connect a signed letter referring to an agreement to purchase land with another document giving the terms of purchase (*k*); to connect a letter promising to "grant the extension of lease you solicit" with another letter showing the day on which the term granted by the lease was to expire (*l*); to show that the "instructions" to a solicitor referred to in a letter were a written memorandum containing fully the terms of the agreement sought to be enforced (*m*); to connect a letter containing a promise to grant a lease for fourteen years "at the rent and terms agreed upon" with another document in which such rent and terms were specified (*n*); and to show that the purchase referred to in a signed receipt for 31*l*. "as a deposit of the purchase" of certain land was an agreement for purchase of which the terms were contained in a memorandum signed by the purchaser (*o*). So if one write a letter saying, "I accept your offer," there is no doubt that this may be shown by parol evidence to refer to another letter previously received, in which the terms of the offer are fully stated, so that a complete contract in writing may be established by the two letters read together (*p*).

(*k*) *Western* v. *Russell*, 3 V. & B. 187. See also *Cave* v. *Hastings*, 7 Q. B. D. 125 (reference to "our arrangement for the hire of your carriage"); *North* v. *Loomes*, 1919, 1 Ch. 378 (letter from the purchaser's solicitor to the vendor's, referring to "the contract which your client has signed," held to be, together with the receipt for the deposit, a sufficient memorandum signed by the purchaser's authorised agent).

(*l*) *Verlander* v. *Codd*, T. & R. 352.

(*m*) *Ridgway* v. *Wharton*, 6 H. L. C. 238.

(*n*) *Baumann* v. *James*, L. R. 3 Ch. 508.

(*o*) *Long* v. *Millar*, 4 C. P. D. 450; see also *Studds* v. *Watson*, 28 Ch. D. 305; *Oliver* v. *Hunting*, 44 Ch. D. 205; in which cases writings referring to "the purchase-money" were allowed to be explained by parol evidence and so connected with other documents containing the remaining terms of the purchase; *McMeekin* v. *Stevenson*, 1917, 1 I. R. 348, where the word "sold" in a note made in the auctioneer's book was held to be explicable by parol evidence as being connected with the conditions of sale; *Stokes* v. *Whicher*, 1920, 1 Ch. 411, where a written memorandum signed by the vendor's agent showed that "I" had agreed to purchase certain land for 2,000*l*. and to pay a deposit of 50*l*., which had been received, and parol evidence was admitted to show (1) that the deposit had been paid by a cheque signed by the purchaser, (2) that the purchaser had signed a memorandum in the same terms (omitting the vendor's agent's signature and the receipt for the deposit), and (3) that "I" was the person who paid the deposit; and it was considered that a sufficient memorandum was made out by any one of these alternatives.

(*p*) Bramwell, L. J., *Long* v. *Millar*, 4 C. P. D. 450, 454; Field, J., *Cave* v. *Hastings*, 7 Q. B. D. 125, 128; Kekewich, J., *Oliver* v. *Hunting*, 44 Ch. D. 205, 209.

Similarly, parol evidence has been admitted to connect a letter addressed "Dear Sir" only with the envelope in which it was enclosed, and on which the purchaser's name was written (*q*). On the other hand, memoranda of sales written in auctioneers' books in terms, which needed no explanation, have been held insufficient to satisfy the Statute, on the ground that they contained no reference to special conditions on which the sales were made (*r*).

The signature required.

The signing contemplated by the Statute appears to be writing the name (*s*) of the party to be charged or his authorized agent (*t*), so as to authenticate the memorandum (*u*). And as the Statute requires signing only and not subscribing, it does not much matter in what part of the document the signature is placed, provided the name be inserted in such a manner as to govern the whole memorandum (*x*). Thus in the case of memoranda drawn up in the third person, the mention of the names of the parties at the beginning has frequently been held to be a sufficient signature (*y*). So writing a person's name at the head of a memorandum of an agreement, to which he is a party, has been held to be a sufficient signature (*z*). But where a

(*q*) *Pearce* v. *Gardner*, 1897, 1 Q. B. 688.

(*r*) *Hinde* v. *Whitehouse*, 7 East, 556, 569, 570; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Rishton* v. *Whatmore*, 8 Ch. D. 467.

(*s*) The party's usual signature, with initials for the Christian names, will do; *R.* v. *Avery*, 18 Q. B. 576. Writing the initials only of the Christian name and surname, or even making a mark, appears to be a sufficient signature, if the signer be otherwise sufficiently described in the memorandum; *Selby* v. *Selby*, 3 Mer. 2; *Hubert* v. *Moreau*, 12 J. B. Moore, 216, 219. And it seems that signature by initials only may be enough without any other description of the signer, parol evidence being admissible to identify him; *Chichester* v. *Cobb*, 14 L. T. N. S. 433; cf. *Sweet* v. *Lee*, 3 Man. & Gr. 452, 460. But signature by mark alone without name or description is open to the objection that the memorandum is incomplete in not showing the party to be charged; *Hubert* v. *Moreau*, 2 C. & P. 528. A description, which may be sufficient to identify the person described as a party to the agreement (see ante, p. 5), may not be sufficient to constitute his signature of the memorandum; *Selby* v. *Selby*, 3 Mer. 2.

(*t*) *Phillimore* v. *Barry*, 1 Camp. 513; *White* v. *Proctor*, 4 Taunt. 209.

(*u*) *Stokes* v. *Moore*, 1 Cox, 219.

(*x*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Lobb* v. *Stanley*, 5 Q. B. 574; *Caton* v. *Caton*, L. R. 2 H. L. 127, 143.

(*y*) See cases cited in preceding note; and *Propert* v. *Parker*, 1 Russ. & My. 625; *Bleakley* v. *Smith*, 11 Sim. 150.

(*z*) *Schneider* v. *Norris*, 2 M. & S. 286; *Evans* v. *Hoare*, 1892, 1 Q. B. 593, where note that the letter was written by the defendants' clerk by their authority, and then presented to the plaintiff for signa-

name inserted in the body of a memorandum relates only to particular sentences, it cannot be regarded as a signature of the whole document (*a*). And writing the names of the parties in a memorandum of agreement (even so as to govern the whole) will not be considered to be signing, if the terms of the instrument show that the parties intended it to be authenticated by further signature (*b*). If, however, the terms of a memorandum, in which the parties' names are inserted, leave a doubt, whether further signature was intended, parol evidence is admissible to show that either party made, authorized or adopted such signing of his name as his signature (*c*).

Signature of party to be charged, or his agent, sufficient.

The memorandum mentioned in the 4th section of the Statute of Frauds is required to be signed by the party to be charged, or his agent. It is settled that the other party need not sign the memorandum, in order to enforce the agreement; it is sufficient that he be ready and willing to perform his part of the contract (*d*). An agent authorized to sign a memorandum of contract for his principal need not, it is held, be thereunto authorized in *writing* (*e*). And the memorandum may well be made or signed at any time after the contract has been entered into, but before an action is brought to enforce it (*f*). Agreements made without complying with the requirements of the Statute are held to be, not void, but only not enforceable (*g*).

Memorandum subsequent to the contract.

Cases where agreement enforceable without compliance with Statute of Frauds.

An oral agreement for the sale of land may be enforced in certain exceptional circumstances, although the requirements of the Statute of Frauds have not been complied with. These are, first, where the sale is made by the Court, when the judicial

ture; so that the defendants' name was actually written by their authorized agent; *Sims* v. *Landray*, 1894, 3 Ch. 318.

(*a*) *Stokes* v. *Moore*, 1 Cox, 219; *Caton* v. *Caton*, L. R. 2 H. L. 127.

(*b*) *Hubert* v. *Treherne*, 3 Man. & Gr. 743; *S. C.*, *nom. Hubert* v. *Turner*, 4 Scott, N. R. 486.

(*c*) *Johnson* v. *Dodgson*, 2 M. & W. 653; see also *Schneider* v. *Norris* and *Evans* v. *Hoare*, ubi sup., which were decided upon this principle; *Hucklesby* v. *Hook*, 82 L. T. 117.

(*d*) *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Reuss* v. *Picksley*, L. R. 1 Ex. 342; and consider *Auerbach* v. *Nelson*, 1919, 2 Ch. 383, above, p. 6, where the vendor alone signed the memorandum.

(*e*) *Waller* v. *Hendon*, 5 Vin. Abr. 524, pl. 45; Sug. V. & P. 145; *Sims* v. *Landray*, 1894, 2 Ch. 318; *Daniels* v. *Trefusis*, 1914, 1 Ch. 788; and consider *Grindell* v. *Bass*, 1920, 2 Ch. 487.

(*f*) *Re Holland*, 1902, 2 Ch. 360; *Grindell* v. *Bass*, 1920, 2 Ch. 487; cf. *Re Davies*, 1921, 3 K. B. 628.

(*g*) *Leroux* v. *Brown*, 12 C. B. 801; *Maddison* v. *Alderson*, 8 App. Cas. 467, 474, 488.

character of the proceedings is held to preclude the danger of the mischief, which the Statute was intended to prevent (*h*). 1. Sale by Court.

Secondly, according to the present practice, the defence of non-compliance with the requirements of the Statute of Frauds must be specially pleaded in an action upon a contract (*i*). So that if one sued in respect of an oral agreement for the sale of land omit to plead the defence of the Statute, the agreement may be established either by the admission of its existence in the defendant's pleading (*k*), or if not so admitted by oral evidence (*l*). And the Courts will now enforce an agreement so established, whether the relief claimed be the specific performance of the contract or damages for its breach (*m*). 2. Where defence of Statute no taken.

Thirdly, an agreement may be established by oral evidence, notwithstanding the terms of the Statute of Frauds, where it would be a fraud to repel proof of the agreement under cover of the Statute (*n*). Thus if an absolute conveyance of land be obtained under an oral agreement for a mortgage, the mortgagee will not be allowed to set up the Statute of Frauds as a defence to an action to enforce the right of redemption (*o*). So if one be induced to sign a written contract for the sale or purchase of 3. Fraud.

(*h*) *A.-G.* v. *Day,* 1 Ves. sen. 218, 221; Sug. V. & P. 109; Dart, V. & P. 197, 1201, 5th ed.; 227, 1329-30, 6th ed.; 218, 1168, 7th ed.; Fry, Sp. Perfce. § 562.

(*i*) R. S. C., Order 19, r. 15; *Clarke* v. *Callow,* 46 L. J. N. S. Q. B. 53; see *Odhams* v. *Brunning,* 12 Times L. R. 303, reversed 13 Times L. R. 65; *Humphries* v. *Humphries,* 1910, 2 K. B. 531. And not only must the defence of the Statute be specially pleaded, but the exact point, as to which that defence is raised, must be clearly stated; *Pullen* v. *Snelus,* 40 L. T. 363; *North* v. *Loomes,* 1919, 1 Ch. 378, 383, 384.

(*k*) See R. S. C., Order 19, rr. 13-20.

(*l*) *Olley* v. *Fisher,* 34 Ch. D. 367; *James* v. *Smith,* 1891, 1 Ch. 384.

(*m*) Under the old Chancery practice, an oral agreement would be specifically enforced, if it were admitted by the defendant's answer, and he did not insist on the Statute; *Limondson* v. *Sweed,* Gilb. 35; *Gunter* v. *Halsey,* Amb. 586; *Ridgway* v. *Wharton,* 3 De G., M. & G. 677, 689-692. But at common law, it was not necessary or proper to plead the Statute *specially.* If the defendant pleaded the general issue (that is, a general denial of the contract), the plaintiff had to establish a contract enforceable at law; and if he failed to prove compliance with the Statute of Frauds, the defendant might then raise the defence of the Statute; see *Buttemere* v. *Hayes,* 5 M. & W. 456, 460; *Leaf* v. *Tuton,* 10 M. & W. 393. And see *Futcher* v. *Futcher,* 45 L. T. N. S. 306.

(*n*) Eldon, C., *Mestaer* v. *Gillespie,* 11 Ves. 627-8; *Haigh* v. *Kaye,* L. R. 7 Ch. 469, 474; *Rochefoucauld* v. *Boustead,* 1897, 1 Ch. 196, 203.

(*o*) 1 Eq. Ca. Abr. 20, pl. 5; *Walker* v. *Walker,* 2 Atk. 98; *England* v. *Codrington,* 1 Eden, 169; *Lincoln* v. *Wright,* 4 De G. & J. 16, 22; *Douglas* v. *Culverwell,* 3 Giff. 251; 4 De G., F. & J. 20.

land on the faith of some variation being made in the terms of the written agreement or of the performance of some collateral stipulation, oral evidence of the variation or stipulation so agreed upon will not be excluded by reason of the Statute (*p*). So where it is arranged that an agreement made orally shall be put into writing, but this is prevented by the fraud of one of the parties, he will not be allowed to avail himself of the defence of the Statute (*q*). Fourthly, if an oral contract for the sale of land be partly performed by one of the parties thereto, that may preclude the other from setting up the defence of the Statute of Frauds to an action under the equitable jurisdiction of the Courts for the specific enforcement of the contract (*r*). For it is held in equity that when there has been part performance of an oral contract for the sale of land (which, as we have seen, is not *void* (*s*)), the parties are to be charged not so much upon the contract (*t*) as upon the equities arising from the acts of performance. The case is considered to have gone beyond the stage of mere contract and therefore to be outside the mischief aimed at by the Statute; and in order to do justice between the parties, oral evidence of the contract is admitted (*u*). But to have this effect, the acts of part performance must, according to the authoritative phrase, be "unequivocally and and in their own nature referable to some such agreement as that alleged" (*x*). That is to say, the acts must be such that the existence of an agreement such as alleged is the only reasonable inference therefrom; they must be not only consistent with

4. Part performance.

(*p*) See *Pember* v. *Mathers,* 1 Bro. C. C. 52; *Clarke* v. *Grant,* 14 Ves. 519; *Jervis* v. *Berridge,* L. R. 8 Ch. 351; Fry, Sp. Perfce. §§ 568, 809.

(*q*) *Maxwell* v. *Montacute,* Prec. Ch. 526. But unless there be fraud, an oral agreement to put in writing and sign the terms of a contract regulated by the 4th section of the Statute of Frauds cannot be enforced; *Wood* v. *Midgley,* 5 De G., M. & G. 41, 45; see Fry, Sp. Perfce. § 575, p. 267, 3rd ed.; p. 274, 6th ed.; *Johnston* v. *Boyes,* 42 Sol. J. 610; *S. C.,* on further proceedings, 1899, 2 Ch. 73.

(*r*) See Selborne, C., *Maddison* v. *Alderson,* 8 App. Cas. 467, 474 et seq. A party sued for damages on an oral contract under the common law jurisdiction of the Courts is not precluded from raising the defence of the Statute on account of part performance of the contract; *Lavery* v. *Pursell,* 39 Ch. D. 508, 518.

(*s*) Above, p. 10.

(*t*) See the words of the Statute; above, p. 3.

(*u*) See *Maddison* v. *Alderson,* 8 App. Cas. 475-8; *Chaproniere* v. *Lambert,* 1917, 2 Ch. 356, 359, 361.

(*x*) *Maddison* v. *Alderson,* 8 App. Cas. 479.

the contract asserted but referable to no other title (*y*). The acts moreover must be such as would render it a fraud to raise the defence of want of signed writing (*z*). The terms of the agreement, of which the existence is so inferred, must be duly proved by oral evidence (*a*). And the agreement so proved must be a contract enforceable (in all respects save the absence of signed writing) under the equitable as distinguished from the common law jurisdiction of the Courts (*b*). To give examples, taking possession of land under an oral agreement for the purchase or lease of it is the strongest case of an act of part performance raising the equity in question. For "the acknowledged possession of a stranger in the land of another is not explicable save on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract" (*c*). And a request by a purchaser to the vendor to give tenants notice to quit has been held to be a sufficient part performance of a contract of sale to exclude the Statute (*d*). But mere holding over by a tenant whose term has expired is not unequivocally referable to a new contract with his landlord (*e*). So payment of part, or, as it appears, the whole of the purchase-money is not sufficient to let in oral evidence of a contract for the sale of land; for "the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land" (*f*).

(*y*) See *Wills* v. *Stradling*, 3 Ves. jun. 378, 381; *Morphett* v. *Jones*, 1 Sw. 172, 181; *Chaproniere* v. *Lambert*, 1917, 2 Ch. 356, 361.

(*z*) *Buckmaster* v. *Harrop*, 7 Ves. 341, 345; Redesdale, Ir. C., *Clinan* v. *Cooke*, 1 Sch. & Lef. 22, 41; *Mundy* v. *Joliffe*, 5 My. & Cr. 167, 177; *Chaproniere* v. *Lambert*, 1917, 2 Ch. 356, 361.

(*a*) *Cooth* v. *Jackson*, 6 Ves. 12, 38; *Thynne* v. *Glengall*, 2 H. L. C. 131, 158; *Maddison* v. *Alderson*, 8 App. Cas. 467.

(*b*) *Britain* v. *Rossiter*, 11 Q. B. D. 123; *McManus* v. *Cooke*, 35 Ch. D. 681; *Lavery* v. *Pursell*, 39 Ch. D. 508, 518; Fry, Sp. Perfce. §§ 592-598.

(*c*) Plumer, M. R., *Morphett* v. *Jones*, 1 Sw. 181; and see Jessel, M. R., *Ungley* v. *Ungley*, 5 Ch. D. 887, 890; *Dickinson* v. *Barrow*, 1904, 2 Ch. 339, 344; *Hohler* v. *Aston*, 1920, 2 Ch. 420; *Brough* v. *Nettleton*, 1921, 2 Ch. 25. Possession taken before but continued after the contract may, if unequivocally referable to the contract, be a sufficient act of part performance; *Hodson* v. *Heuland*, 1896, 2 Ch. 428; *Biss* v. *Hygate*, 1918, 2 K. B. 314.

(*d*) *Daniels* v. *Trefusis*, 1914, 1 Ch. 788.

(*e*) *Wills* v. *Stradling*, 3 Ves. jun. 381; *Maddison* v. *Alderson*, 8 App. Cas. 480.

(*f*) *Maddison* v. *Alderson*, 8 App. Cas. 478-9; *Chaproniere* v. *Lambert*, 1917, 2 Ch. 356, 359, 360.

Offer and acceptance.

In regard to the expression of the parties' consent, the formation of a contract for the sale of land is governed by the general law of contract, subject of course to the requisite of form (*g*) (namely, signed writing), which has just been considered. Thus in order that the acceptance of an offer (*h*) may make a contract, it is essential that there should be *communication* of the offer and its acceptance to each party respectively (*i*), and the acceptance must be absolute and identical with the terms of the offer (*k*). If therefore you offer to sell me your land, though I make up my mind to accept, there is no contract between us until I duly signify to you my acceptance. And this will be the case, even though you state in your offer that, unless you hear from me, you will consider the matter as concluded; for though you may indicate to me the manner in which my acceptance shall be signified, you are not at liberty to stipulate that my acceptance shall be implied, if I do nothing (*l*). Again if I offer to sell you my land for 1,000*l*., an answer that you will give 950*l*. for it is no acceptance of my offer, but a counter-proposal on your part; it is a rejection of my offer; and if I should decline your proposal, you would not be at liberty to bind me by accepting my terms, unless I had renewed my offer to you (*m*). So an offer to purchase land is not accepted by a letter agreeing to sell under conditions of sale, which modify the terms of an open contract (*n*). An offer may be revoked (*o*) at any time before its acceptance be duly communicated to the proposer; but, as in the case of acceptance, mere change of mind is not enough to revoke an offer; the change must be communicated to the other party (*p*). When

Communication.

Acceptance must be absolute and identical with offer.

Hyde v. *Wrench.*

Revocation of offer.

(*g*) Above, p. 2.

(*h*) See above, p. 2.

(*i*) *Felthouse* v. *Bindley,* 11 C. B. N. S. 869; *Dickinson* v. *Dodds,* 2 Ch. D. 463; *Brogden* v. *Metropolitan Ry. Co.,* 2 App. Cas. 666, 691-2.

(*k*) *Hyde* v. *Wrench,* 3 Beav. 334; *Jones* v. *Daniel,* 1894, 2 Ch. 332; and see *Felthouse* v. *Bindley,* ubi sup.; *Bonnewell* v. *Jenkins,* 8 Ch. D. 70.

(*l*) See cases cited in last note but one; and consider the curious case of *Harvey* v. *Facey,* 1893, A. C. 552.

(*m*) *Hyde* v. *Wrench,* 3 Beav. 334.

(*n*) *Crossley* v. *Maycock,* L. R. 18 Eq. 180; *Jones* v. *Daniel,* 1894, 2 Ch. 332. As to the terms of an open contract, see below, p. 16, and Chap. II.

(*o*) Or varied, variation being a revocation and new offer; *Honeyman* v. *Marryat,* 21 Beav. 14, 20, affd. 6 H. L. C. 112.

(*p*) *Byrne* v. *Van Tienhoven,* 5 C. P. D. 344, 347; *Henthorn* v. *Fraser,* 1892, 2 Ch. 27, 31, 32, 36. It appears, however, that an offer may be effectually revoked, if the proposer have distinctly signi-

the acceptance of an offer is duly communicated to the proposer, the contract is completely formed, and neither party is at liberty to recede (*q*). Here we may notice that, where the parties are in communication through the post, or where the post is the natural channel for sending the answer to a proposal of contract, acceptance of the offer is held to be duly signified when a letter of acceptance is *posted* (*r*). So that the proposer is bound, notwithstanding that the letter be delayed in the post beyond the time when he naturally expected to receive it (*s*), and even though the letter be lost in the post and he never received it (*t*); and he cannot withdraw his offer after a letter accepting it has been posted to him (*u*). This is a rule of convenience, and its best explanation seems to be that a proposer making an offer, to which he might naturally expect the answer to be sent by post, must be taken, if not to have authorized that mode of communication, at least to have accepted its usual conditions and risks. Posting a letter of acceptance of such an offer is therefore considered as a compliance with the conditions of the offer as regards the signification of acceptance (*x*). It follows that the acceptor ought not to be prejudiced by anything which may occur after his letter has been posted. Thus it would be unjust, and it would be impossible to carry on business through the post, if the proposer were allowed to withdraw in the interval between the posting of the acceptance and its arrival. So delay or loss of a letter in the post is no fault of the sender, who parts with all control over it when it is posted; and he ought not to suffer therefrom (*y*). This doctrine, it should be stated, has no application in the case of the revocation of an offer; which, if communicated by post, only takes effect when the letter actually reaches the person to whom it is addressed; for the

Communication through the post.

fied his change of mind and this come to the knowledge of the other party, though the proposer did not make the communication; *Dickinson* v. *Dodds*, 2 Ch. D. 463.

(*q*) *Adams* v. *Lindsell*, 1 B. & A. 681; *Byrne* v. *Van Tienhoven*, *Henthorn* v. *Fraser*, ubi sup.

(*r*) See *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216; *Henthorn* v *Fraser*, 1892, 2 Ch. 27; *Re London and Northern Bank*, 1900, 1 Ch. 220.

(*s*) *Dunlop* v. *Higgins*, 1 H. L. C. 381.

(*t*) *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216, *diss.* Bramwell, L. J.

(*u*) *Re Imperial Land Co. of Marseilles, Harris's Case*, L. R. 7 Ch. 587; *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344; *Henthorn* v. *Fraser*, 1892, 2 Ch. 27.

(*x*) See *Henthorn* v. *Fraser*, 1892, 2 Ch. 27.

(*y*) See the cases cited in the five preceding notes.

revocation of an offer is not a matter which its recipient can be expected to contemplate, and his acceptance of the exigencies of postal communication cannot be inferred (*z*). In order to bind the proposer, an offer must in general be accepted within a reasonable time after it is made (*a*). What is a reasonable time is of course a question of fact in each particular case (*b*). Here it may be noticed that a promise to keep an offer open for a particular time is unenforceable for want of consideration (*c*); so that an offer accompanied by such a promise may be withdrawn, provided it has not been accepted, before the time specified has elapsed (*d*). An offer made to buy or sell land, with a stipulation that it must be accepted within some specified time, cannot be accepted after that time is gone by; unless the parties agree to extend the time for acceptance or that an acceptance made after that time shall be valid. And as such an agreement is not a term of the contract of *sale* (which is not constituted until after acceptance of the offer), it need not be put into writing, and may be proved by parol evidence or implied from the parties' subsequent conduct (*e*).

Time for acceptance.

Promise to keep offer open.

Offer to be accepted within a specified time.

Agreement to extend time, or take an acceptance made too late.

Owing to the above-mentioned provisions of the Statute of Frauds, the object of all negotiations as to the sale of land is to arrive at an agreement, not merely expressed orally, but put into writing and signed (*f*). And it is usually desired, on the vendor's part at least, not to enter into an open contract (that is, a contract simply ascertaining the parties, the property to be sold and the price, and leaving the other terms to be implied by law), but to modify by express stipulation the legal incidents of the bargain. For as we shall see, the law imposes on every vendor of land the duty of strictly proving his title; and it is not often advisable that he should undertake his full legal liabilities in this respect (*g*). Thus a formal contract for the

Negotiation of a contract for sale.

Open contract.

(*z*) See the cases cited in note (*u*) to p. 15, above; also *Curtice* v. *London, City and Midland Bank, Ltd.*, 1908, 1 K. B. 293.

(*a*) *Rummens* v. *Robins*, 3 De G., J. & S. 88; *Ramsgate Victoria Hotel Co.* v. *Montefiore*, L. R. 1 Ex. 109.

(*b*) See *Dunlop* v. *Higgins*, 1 H. L. C. 381.

(*c*) *Cooke* v. *Oxley*, 3 T. R. 653. If the promise be made by deed or for valuable consideration, it is of course enforceable.

(*d*) *Routledge* v. *Grant*, 4 Bing. 653; *Dickinson* v. *Dodds*, 2 Ch. D. 463; *Henthorn* v. *Fraser*, 1892, 2 Ch. 27.

(*e*) *Morell* v. *Studd and Millington*, 1913, 2 Ch. 648.

(*f*) See above, pp. 3, 4.

(*g*) It is frequently desirable that a vendor should limit by express stipulation the time for which he is to show title; and it is always

sale of land generally contains special stipulations of a technical character. It is therefore very necessary for those who negotiate the sale of land to understand the principles of the formation of contract. The main thing to remember is that unconditional acceptance of an offer makes a contract, to which no new term can be added, and from which neither party can recede, except by the consent of both; whilst any acceptance, which is conditional on the variation of some term of the offer, is really a new proposal, and must in its turn be accepted by the other party before a contract is formed (*h*). Any one, who receives an offer of sale or purchase, to which he is favourably inclined, should make up his mind before answering whether he wishes to conclude an immediate contract or merely to signify his assent that the terms proposed shall form the basis of a future contract. In the former case he should accept unconditionally and in the simplest words; for instance, "I accept the offer contained in your letter of such a date" (*i*). In the latter event he should be very careful to express plainly his intention to give a provisional assent only and not to be bound until all the terms of a future agreement have been settled. The best way to do this is to state clearly that the intended contract may contain other terms than those provisionally accepted; to say, for example, "I am willing that the terms of purchase proposed in your letter dated, &c. shall form the basis of a future contract between us to be approved by my solicitor and to contain such stipulations as he may advise me to insert therein." For if an offer be accepted with the suggestion that a formal contract shall be prepared but without expressing any intention that the terms proposed shall or may be varied thereby, the acceptance is practically unconditional and the contract is formed at once (*k*).

Answering proposals as to sale.

advisable that he should reserve to himself the power of rescinding the contract if the purchaser should insist on any requisition as to title which he is unable or unwilling to comply with.

(*h*) See the cases cited above, p. 14; and in the next three notes.

(*i*) See *Perry* v. *Suffields, Ltd.*, 1916, 2 Ch. 187, 188, 190; above, p. 8.

(*k*) *Fowle* v. *Freeman*, 9 Ves. 351, where an agreement to sell signed by the vendor, to which he had subjoined a letter to his solicitor desiring him to prepare a proper agreement for himself and the purchaser to sign, was held to be a concluded contract; *Vale of Neath Colliery Co.* v. *Furness*, 45 L. J. N. S. Ch. 276, where acceptance of an offer, with the words "I will send draft contract in due course," was held to conclude the contract; *Lewis* v. *Brass*, 3 Q. B. D. 667, where acceptance of a tender, with an intimation that a contract would be prepared, was held to constitute a contract; *Bonnewell* v.

Whilst if assent be given to an offer with such a reference to a future or formal contract as shows that the terms of that contract are not presently fixed but are to be open to the assenting party's subsequent approval, then the assent is conditional on a future contract being made, and is not, therefore, such an unqualified acceptance of the offer as would operate to conclude an immediate contract (*l*). And when an offer is accepted in writing with a

Jenkins, 8 Ch. D. 70, where a letter from the vendor's agents accepting the purchaser's offer and stating that they had asked the vendor's solicitors to prepare contract, was held to conclude the contract; *Rossiter* v. *Miller,* 3 App. Cas. 1124, 1139, 1143, 1151, where the purchaser's acceptance of an offer made subject to certain conditions, of which one was that the purchaser should execute a contract embodying the conditions, was held to constitute a contract; *Filby* v. *Hounsell,* 1896, 2 Ch. 737, where an offer to give 350*l.* for some leasehold property and if the offer were accepted to pay deposit and sign contract on the auction particulars was accepted "subject to contract as agreed," and it was considered that this concluded the contract (the observations of Younger, J., in *Lovesy* v. *Palmer,* 1916, 2 Ch. 233, 242-244, on the other point decided in *Filby* v. *Hounsell* do not affect the decision on the above point); *Rossdale* v. *Denny,* 1921, 1 Ch. 57, 59-64, 66.

(*l*) *Chinnock* v. *Marchioness of Ely,* 4 De G., J. & S. 638, 646, where a letter, in reply to an offer to purchase, stating that the vendor would proceed with the sale, and that the draft contract was being prepared and would soon be forwarded for the purchaser's approval, was held not to be an unconditional acceptance of the offer; *Bartlett* v. *Greene,* 30 L. T. N. S. 553, where a letter agreeing to buy leaseholds with the stipulation "a formal contract to be signed by me when prepared by your solicitors and approved by my solicitors," was held not to be a concluded contract; *Winn* v. *Bull,* 7 Ch. D. 29, where an agreement as to terms of lease, "subject to the preparation and *approval* of a formal contract," was held not to constitute a contract, the reference to the *approval* of the formal contract being considered to imply contemplation of the possibility of introducing new terms; *Harvey* v. *Barnard's Inn,* 50 L. J. Ch. 750, where an agreement "subject to a contract *to be settled* between the vendor's and purchaser's solicitors" and an agreement "subject to a proper contract and the payment of a deposit *to be agreed upon*" were held not to be concluded contracts; *Hawkesworth* v. *Chaffey,* 55 L. J. Ch. 335, where an agreement for sale "subject to a formal contract being prepared and signed by both parties and approved by their solicitors," was held not to be a concluded contract; *Hucklesby* v. *Hook,* 82 L. T. 117, 118, where Buckley, J., expressed the opinion that a letter, agreeing to give 540*l.* for some land and asking the recipient to instruct his solicitor to forward the contract to the writer, was in the circumstances not a concluded contract (this case was, however, decided on the point that there was no sufficient signature by the vendor of the memorandum); *Page* v. *Norfolk,* 70 L. T. 23, 781, where the acceptance of an offer made by purchasers to buy, "subject to our approving a detailed contract to be entered into," was held not to conclude a contract; *Lloyd* v. *Nowell,* 1895, 2 Ch. 744, where an agreement by a vendor to sell, "subject to the preparation by my solicitor and completion of a formal contract," was held to be no contract, and the condition was considered not to be a stipulation for the vendor's benefit only, such as he might waive; *Santa Fé Land Co., Ltd.* v. *Forestal Land, Timber and Rail-*

reference to the preparation of a formal or other contract, it is of course a question of the construction of the particular documents, whether the acceptance is unconditional or not. If not, it is merely a counter-proposal and no contract is made (*m*).

ways Co., Ltd., 26 Times L. R. 534, where it was held that the acceptance of an offer by a purchaser's solicitors to buy "subject to a formal contract to be approved by your solicitors and ourselves on acceptance of the offer when any minor details can be settled," did not constitute a contract; *Von Hatzfeldt-Wildenburg* v. *Alexander*, 1912, 1 Ch. 284, where it was held that a letter from the purchaser's agents accepting an offer to sell leasehold property, subject to the condition that the purchaser's solicitors should approve the title to and covenants contained in the lease, the title from the freeholder, and the form of contract, was not an unqualified acceptance, and that the purchaser could not waive the condition; *Coope* v. *Ridout*, 1920, 2 Ch. 411, 417-419, affirmed, 1921, 1 Ch. 291, where an offer to purchase land for a specified sum "subject to title and contract" was considered to be subject to the condition of a future contract being entered into, and to be such as could not be converted into a firm contract by an unconditional acceptance thereof; *Rossdale* v. *Denny*, C.A., 1921, 1 Ch. 57, where an offer made to purchase leasehold property "subject to a formal contract to embody such reasonable provisions as my solicitors may approve" and unconditionally accepted, was held not to constitute a binding contract; and the case of *North* v. *Percival*, 1898, 2 Ch. 128, doubted in the two former editions of this book, was disapproved.

Acceptance of offer to sell, subject to approval of the title by purchaser's solicitor.

Where an offer to sell land is accepted subject to the approval *of the title* by the purchaser's solicitor or counsel, there is a conflict of authority on the question whether this is an absolute or a conditional acceptance. According to decisions of Fry, J., and the Court of Appeal, such an acceptance is conditional and would not conclude the contract; *Hudson* v. *Buck*, 7 Ch. D. 683, 687; *Hussey* v. *Horne Payne*, 8 Ch. D. 670, 676, 678, reversed on different grounds, 4 App. Cas. 311; and see *Clack* v. *Wood*, 9 Q. B. D. 276; *Coope* v. *Ridout*, 1920, 2 Ch. 411, 416, affirmed, 1921, 1 Ch. 291. But in the case of *Hussey* v. *Horne Payne* in the House of Lords, Lord Cairns, C., expressed the opinion that a condition of this kind is merely indicative of an intention to safeguard the right, which the law gives to the purchaser, of investigating the title, and so in effect adds nothing to the contract; and he doubted the correctness of the C. A.'s decision on this point; see 4 App. Cas. 321, 322. In *Von Hatzfeldt-Wildenburg* v. *Alexander*, ubi sup., Parker, J., considered that the acceptance of an offer to sell leaseholds, on condition that the purchaser's solicitors should accept (besides the title to the lease) the title from the freeholder, was not an unqualified acceptance, because the law does not now give the right to investigate the lessor's title to a purchaser of leaseholds buying under an open contract (see below, Chap. IV.). When a condition of this kind is *accepted* as a term of a concluded contract, it appears to be a condition subsequent avoiding the contract unless it be fulfilled: but it seems that the purchaser's solicitor or counsel could not capriciously reject the title, if good, and that the vendor would be at liberty to prove that he had shown such a title as it was unreasonable for the purchaser's solicitor or counsel not to accept; see *Williams* v. *Edwards*, 2 Sim. 78, 83; *Hudson* v. *Buck*, *Clack* v. *Wood*, ubi sup.; below, Chap. XVIII. § 1.

(*m*) Above, pp. 14, 17; *Von Hatzfeldt-Wildenburg* v. *Alexander*, 1912, 1 Ch. 284, 288, 289; *Rossdale* v. *Denny*, 1921, 1 Ch. 57, 59, 66.

The whole of the correspondence will be looked at.

Here we may notice that, when it is sought to establish a contract by letters which have passed between different parties, the Court will take into consideration the whole of the correspondence which has passed, and will not necessarily draw the line at any particular letter or letters, which might have afforded evidence of a contract, if considered apart from the rest (*n*). But if a definite offer has once been made and accepted without qualification, and it appears that the letters of offer and acceptance contain all the terms agreed upon between the parties at the date of the acceptance, the complete contract thus arrived at cannot be affected by subsequent negotiation, not amounting to a contract, for modifying the terms of the agreement (*o*).

Oral agreement.

Where an agreement for the sale of land is made by word of mouth, an enforceable contract is of course not made until a proper memorandum of the agreement be written out and signed by one of the parties (*p*).

Oral acceptance of written offer.

But an offer in writing specifying all the terms of a proposed agreement and signed by the proposer may be accepted orally, and will then be a sufficient memorandum of the contract to bind him under the Statute of Frauds (*q*).

Sale by auction.

With regard to the formation of the contract on the sale of land by auction, a bidding at an auction is no more than an offer, and no contract is created until that offer is accepted by the auctioneer, as the vendor's agent; acceptance being signified by the fall of the auctioneer's hammer. As an offer is revocable before acceptance, a person bidding at a sale by auction may audibly retract his bidding at any time before the fall of the hammer (*r*). For this reason a stipulation that no bidding shall be retracted is almost invariably made. It seems however that such a condition cannot be enforced (*s*). For, as Lord

(*n*) *Hussey* v. *Horne Payne,* 4 App. Cas. 311, 316; *Bristol, Cardiff and Swansea Aërated Bread Co.* v. *Maggs,* 44 Ch. D. 616, as to which see next note.

(*o*) *Perry* v. *Suffields, Ltd.*, C.A., 1916, 2 Ch. 187, 191-193, approving the law laid down by North, J., in *Bellamy* v. *Debenham,* 45 Ch. D. 481, 486, 493-495, and his criticism of the *dicta* of Kay, J., in *Bristol, Cardiff and Swansea Aërated Bread Co.* v. *Maggs,* 44 Ch. D. 616, 621, 624, 625.

(*p*) See above, pp. 3, 12, n. (*q*).

(*q*) *Reuss* v. *Picksley,* L. R. 1 Ex. 342; *Lever* v. *Koffler,* 1901, 1 Ch. 543.

(*r*) *Payne* v. *Cave,* 3 T. R. 148.

(*s*) Such a condition made on a sale by the Court has been held to bind the solicitor of a mortgagee, who consented to the sale but was not a party to the suit; *Freer* v. *Rimner,* 14 Sim. 391.

St. Leonards pointed out (*t*), to hold that an action would lie on an implied undertaking not to retract a bidding would be an invasion of the before-mentioned provision of the Statute of Frauds (*u*), whereby no action shall be brought to charge any person upon any contract or sale of lands, unless the agreement be in writing and signed by him or his agent. And sales by auction are within the Statute (*x*). On a sale by auction the auctioneer is held to be the agent both of the vendor and the purchaser for the purpose of signing a memorandum of the contract. This authority is given by the vendor by his appointment of the auctioneer to conduct the sale. In the case of the purchaser, the agency is conferred by the acceptance of his bidding, which is considered to imply an offer of such authority (*y*). The vendor may of course revoke the authority given to the auctioneer at any time before the bidding is accepted (*z*). There is no doubt that if property be knocked down to any one at an auction and the auctioneer sign a memorandum of the contract directly after the sale, neither vendor nor purchaser can then withdraw his authority from the auctioneer (*a*). But the authority impliedly given by the purchaser to the auctioneer is an authority to sign *immediately* after the sale; and if this be not done, the authority will cease (*b*). The *vendor's* authority to the auctioneer is however

Auctioneer agent to sign.

(*t*) Sug. V. & P. 14; 1 Dart, V. & P. 124, 5th ed.; 139, 6th ed.; 136, 7th ed.

(*u*) Above, p. 3.

(*x*) *Blagden* v. *Bradbear*, 12 Ves. 466.

(*y*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *White* v. *Proctor*, 4 Taunt. 209; *Kemeys* v. *Proctor*, 1 J. & W. 350; Sug. V. & P. 42, 43, 147; Fry, Sp. Perfce. § 529. The auctioneer cannot delegate his authority in this respect. For vendor or purchaser to be bound by the signature of the auctioneer's clerk, he must have authorized the clerk to sign for him. It seems that such authority may be implied on the part of the vendor from his appointment of the auctioneer, the usual course of business being for the clerk to take down the names. But it has been held that no similar authority can be implied on the part of the purchaser from his bidding: *Bell* v. *Balls*, 1897, 1 Ch. 663. If, however, either party assent in any way to the clerk's signature on his behalf, he is bound. See *Bird* v. *Boulter*, 4 B. & Ad. 443; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Dyas* v. *Stafford*, 7 L. R. Ir. 590, 602; Sug. V. & P. 146; Fry, Sp. Perfce. § 531; *Sims* v. *Landray*, 1894, 2 Ch. 318, where the purchaser stood by while the auctioneer's clerk inserted his name in the memorandum.

Auctioneer's clerk.

(*z*) See *Warlow* v. *Harrison*, 1 E. & E. 295, 309; *Johnston* v. *Boyes*, 2 Ch. 318, where the purchaser stood by while the auctioneer's clerk

(*a*) See the cases cited at the beginning of the last note but one.

(*b*) *Bell* v. *Balls*, 1897, 1 Ch. 663.

of a more permanent character (*c*). And it has been held that after the fall of the hammer neither party can revoke the auctioneer's authority to sign for him; so that a memorandum signed by the auctioneer immediately after the sale will bind both parties, notwithstanding that one of them expressly forbade the auctioneer, after the fall of the hammer, to sign on his behalf (*d*). If however after a sale by auction the vendor or the purchaser refuse to sign a memorandum of the contract and the auctioneer will not sign for him, it is difficult to see what remedy the other party has to enforce his bargain. For, as we have seen, apart from fraud, an agreement to put into writing and sign a contract for sale of land cannot be enforced (*e*). And in the absence of a signed memorandum no action lies to charge any person upon the contract for sale (*f*).

Employment of a puffer at an auction.

Under the present law, if a puffer, that is, a person engaged to bid on the vendor's behalf in order to prevent a sale at an undervalue or to force up the price, be employed without the

(*c*) *McMeekin* v. *Stevenson,* 1917, 1 I. R. 348, where the auctioneer's signature affixed on the morning after the sale was held to bind the vendor.

(*d*) *Van Praagh* v. *Everidge,* 1902, 2 Ch. 266, 270, reversed on other grounds, 1903, 1 Ch. 434. The proposition in the text is also countenanced by the fact that in *Mason* v. *Armitage,* 13 Ves. 25, 37, a memorandum signed by an auctioneer was considered to bind the vendor at law, though he swore in his answer that he had revoked the auctioneer's authority before such signature; and by the fact that in *Day* v. *Wells,* 30 Beav. 220 (approved by Stirling, J., *Bell* v. *Balls,* 1897, 1 Ch. 672), an argument against specific performance, that the vendor so revoked the auctioneer's authority, was held to call for no reply; and by the statements in 1 Dart, V. & P. 182, 5th ed.; 209, 6th ed.; 208, 7th ed.; Fry, Sp. Perfce. § 530. In *Mason* v. *Armitage* and *Day* v. *Wells,* however, the actual decision was that, though there were a contract enforceable at law, specific performance thereof would not be enforced in equity on account of circumstances of mistake. And it is said that if one authorize another to sell his land privately, and the agent make an oral contract for sale, the principal may withdraw his authority at any time before the agent signs a written contract on his behalf; *Farmer* v. *Robinson,* 2 Camp. 339, n.; Sug. V. & P. 146. If in the case of a private sale made orally by an agent, the policy of the Statute of Frauds is sufficiently strong to prevail over the general principle that agency cannot be revoked after the agent has so acted under his authority as to induce a third party to alter his legal position (as to which, see Story on Agency, §§ 466-8), it is difficult to see why a sale by auction should be governed by a different rule; especially when the publicity of an auction is expressly held to be no reason for excluding the operation of the statute; *Blagden* v. *Bradbear,* 12 Ves. 466.

(*e*) Above, p. 12, n. (*q*).

(*f*) *Blagden* v. *Bradbear,* 12 Ves. 466; and see *Rainbow* v. *Howkins,* 1904, 2 K. B. 322, 324.

vendor having expressly reserved to himself the right to bid, the sale will be invalid. At common law it was well settled that the employment of puffers or of a single puffer on the vendor's behalf rendered the sale void on the ground of fraud, where it had been announced that the sale would be without reserve or that the highest bidder should be the purchaser (*g*). In equity however there was authority to the effect that the employment of a single puffer, to prevent a sale at an undervalue, would not invalidate the sale, unless the property were expressly or impliedly offered for sale without reserve (*h*): though Lord Cranworth, in *Mortimer* v. *Bell* (*i*), doubted whether he would be bound to hold that the rule, which had been established at common law, did not hold good in equity. The law is now settled by the Sale of Land by Auction Act, 1867 (*k*), whereby it is enacted (*l*) that whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law. The Act also provides (*m*) that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; and if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person. And it is further enacted (*n*) that, where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any *one* person on his behalf to bid at such auction in such manner as he may think proper. It has been held, under this Act, that if it be stated that land will be sold by auction subject to a reserved price or bidding, without saying that a right to bid is reserved, it is not lawful to employ a puffer to bid up to the

Sale of Land by Auction Act, 1867.

(*g*) *Howard* v. *Castle*, 6 T. R. 642; *Thornett* v. *Haines*, 15 M. & W. 367; Sug. V. & P. 9, 10; *Green* v. *Baverstock*, 10 Jur. N. S. 47; *Mortimer* v. *Bell*, L. R. 1 Ch. 10.

(*h*) *Smith* v. *Clarke*, 12 Ves. 477; *Woodward* v. *Miller*, 2 Coll. 279; Sug. V. & P. 9, 10; 1 Dart, V. & P. 195, 5th ed.; 224, 6th ed.; 209, 7th ed.

(*i*) L. R. 1 Ch. 10, 16.

(*k*) Stat. 30 & 31 Vict. c. 48.

(*l*) Sect. 4.

(*m*) Sect. 5.

(*n*) Sect. 6.

reserve price (*o*). And the opinion has been judicially expressed that the Act limits a vendor, who has reserved the right to bid, to the employment of one person only to bid on his behalf (*p*). The terms of a condition reserving the right to bid must of course be strictly observed; as if the vendor reserve the right of bidding *once*, a second bidding on his behalf will invalidate the sale (*q*). In consequence of this Act, when land is to be sold by auction, the conditions of sale usually provide that the vendor reserves the right to bid as often as he may please; and if the sale be stated to be subject to a reserved price, the right of bidding generally is reserved to the vendor as well (*r*).

Inadvertent acceptance of bidding lower than the reserve price.

Where land is sold by auction subject to a condition that there will be a reserve price, and the auctioneer inadvertently accepts a bid lower than the reserve price, he is at liberty to retract such acceptance and to decline to sign a memorandum of the sale, and will incur no liability in so doing; for the condition is in effect that the property will not be sold for less than the reserve price, and every bidder is bound by that stipulation (*s*).

Auctioneer's authority to sell without reserve.

It appears that, if land be placed in the hands of an auctioneer to be sold, he has authority, in the absence of instructions to the contrary, to put up the property for sale without reserve (*t*), and that the vendor would be bound by a memorandum signed by the auctioneer on his behalf of a sale so made (*u*). But it seems that if an auctioneer instructed to put property up to auction subject to a reserve price should nevertheless advertise the sale to be without reserve and accept a bidding lower than the reserve price and sign a memorandum of such sale, the vendor would not be liable on the contract so made without his authority (*x*). It has been held that, where an auctioneer

(*o*) *Gilliat* v. *Gilliat,* L. R. 9 Eq. 60.

(*p*) Grove and Lindley, JJ., *Parfitt* v. *Jepson,* 46 L. J. N. S. C. P. 529, 532, 533.

(*q*) *Parfitt* v. *Jepson,* ubi sup.

(*r*) 1 Davidson, Prec. Conv. 607, 4th ed.; 518, 5th ed.; Key & Elphinstone, Prec. Conv. 257, 258 and n. (*a*), 4th ed.; 268 and n. (*b*), 10th ed.; see below, Chap. III.

(*s*) *McManus* v. *Fortescue,* 1907, 2 K. B. 1.

(*t*) *Rainbow* v. *Howkins,* 1904, 2 K. B. 322.

(*u*) Above, p. 21.

(*x*) See *McManus* v. *Fortescue,* 1907, 2 K. B. 1, 6, 7, apparently overruling the decision or *dicta* in *Rainbow* v. *Howkins,* 1904, 2 K. B. 322, to the contrary. The general rule certainly is that a plaintiff suing a principal upon a contract made by his agent has the *onus* of proving that the principal did in fact authorise the agent so to contract for him; see below, Chap. XIX. § 2, at end.

instructed to put up property to auction at a reserve price, inadvertently advertises (without disclosing who is his principal) that the sale will be held without reserve and accepts a bid lower than the reserve price, but declines to sign a memorandum of the contract or to carry out the sale, he is liable in damages to the bidder for breach either of a contract or of an implied warranty of authority that the sale shall be without reserve (*y*). But it has been decided that an auctioneer, who advertises that by the direction of his principal, whose identity he discloses, a sale will be held without reserve, does not himself become liable to any bidder at the auction upon a contract that the sale shall be without reserve (*z*). It has been considered that a vendor, who as principal issues an advertisement that a sale of land by auction will be held without reserve or under the condition that the highest bidder shall be the purchaser, is liable, if the sale be held and he then decline to sell to the highest bidder, upon an independent contract that the sale shall be carried out under the conditions advertised, and such contract is not required to be put in writing by the Statute of Frauds (*a*). But it has been held that, if it be advertised that a sale of property by auction will be held on a certain day and that the highest bidder shall be the purchaser, that does not amount to an offer capable of being turned by acceptance into a contract that the sale shall be held on the day specified or at all; and if on the day named the property be not put up for or be withdrawn from sale, a person, who had intended to bid for it, has no cause of action to recover damages for his disappointment or his expenses of attending in expectation of the sale (*b*). If an advertisement of a sale by auction be fraudulently made, any person who is thereby induced to incur useless expense or other detriment has a good cause of action against the advertiser (*c*).

Liability of auctioneer advertising a sale without reserve.

Liability of the owner of property advertising a sale by auction without reserve.

Advertisement of a sale by auction is not an offer, open to become a contract on acceptance, that the sale shall take place.

(*y*) *Warlow* v. *Harrison*, 1 E. & E. 295, 309. This was so decided on the theory of the advertisement being an offer open to all, which was turned into a contract by acceptance of the bidding.

(*z*) *Mainprice* v. *Westley*, 6 B. & S. 420.

(*a*) *Johnston* v. *Boyes*, 1899, 2 Ch. 73, 77, following *Warlow* v. *Harrison*, above, n. (*y*); and see Blackburn and Quain, JJ., *Harris* v. *Nickerson*, L. R. 8 Q. B. 286, 288, 289.

(*b*) *Harris* v. *Nickerson*, L. R. 8 Q. B. 286.

(*c*) *Mainprice* v. *Westley*, 6 B. & S. 420, 427; *Richardson* v. *Silvester*, L. R. 9 Q. B. 34.

Knock-out agreement between intending purchasers at an auction.

It has been held in Courts of Equity that an agreement between two or more intending purchasers at an auction, that one of them only shall bid at the sale and that he shall share the property between them all, is not illegal and may be enforced specifically as between them (*d*), and is no ground for the avoidance by the vendor of the sale, even where held by order of the Court (*e*). And these decisions were accepted as settling the law both by Lord St. Leonards (*f*) and Mr. Dart (*g*). There is, however, a *dictum* of Gurney, J., delivered in the course of a summing-up at *nisi prius* (*h*) that it is an indictable conspiracy for men going to an auction to enter into a "knock-out" agreement. This ruling was pronounced by Parke, B., in a case in the Privy Council (*i*) to be a mere *dictum* in a *nisi prius* case, which could not therefore be relied on. But this *dictum* was followed by Shearman, J., in preference to the other authorities above cited; and he decided that, at all events where goods to be sold at an auction belong to the Crown and are therefore public property, a "knock-out" agreement is against public policy as tending to defraud the public, and is unenforceable as against any party thereto (*k*). This decision

(*d*) *Galton* v. *Emuss*, 1 Coll. 243; *Chattock* v. *Muller*, 8 Ch. D. 177.

(*e*) *Re Carew's Estate*, 26 Beav. 187; see also *Heffer* v. *Martyn*, 36 L. J. Ch. 372, where one paid 500*l*. to another not to bid at an auction.

(*f*) Sug. V. & P. 11, 117, 118, 700.

(*g*) Dart, V. & P. 108, 1047, n. (*x*), 5th ed.; 117, 7th ed.

(*h*) *Levi* v. *Levi*, 6 C. & P. 239, 240.

(*i*) *Doolubdass Pettamberdass* v. *Ramloll, &c.*, 5 Moo. Ind. App. 109, 133.

(*k*) *Rawlings* v. *General Trading Co.*, 1920, 3 K. B. 30. Shearman, J., said, "If the employment of a puffer for the purpose of raising the price without disclosing the fact will render a contract of sale unenforceable, it is difficult to see why a combination by purchasers to keep the price down should not equally be illegal. What is wrong in a vendor ought equally to be wrong in a purchaser." But the learned judge appears to have lost sight of the fact, that the reason, why the employment of a puffer made a sale by auction void at common law, was that it was a breach by the vendor of his representation that the sale was to be without reserve, or that the highest bidder should be the purchaser, and that this rule only applied where such a representation was expressly or impliedly made; see above, pp. 22-24, and cases cited n. (*g*). Surely no similar representation is to be implied on the part of the persons who attend a sale by auction as possible purchasers: but the vendor takes his chance of effecting a sale at a satisfactory price, and his remedy against the property being sold at less than its fair value is, not to sell without reserve, but to fix a reserve price. And, indeed, it is difficult to see why the Crown should be in a better position than other vendors in this respect.

was however reversed on appeal, the majority of the Court considering that the case was concluded by the authorities above cited, and that the *dictum* of Gurney, J., was not be be regarded as law (*l*).

Payment of a deposit.

A matter to be considered before the formation of a contract is the payment of a deposit. For no deposit of any part of the purchase-money can lawfully be demanded after an open contract for sale has been concluded; as the whole price is not payable until the time for completion, which in the case of an open contract is the time when the vendor shall have shown a good title (*m*). On sales by auction a stipulation is invariably made that a deposit of a certain proportion (generally ten per cent.) of the purchase-money shall be paid by the purchaser immediately on entering into the contract. On London sales, it is usually provided that the deposit shall be paid into the hands of the auctioneers; on country sales, the vendor's solicitors are generally appointed to receive it (*n*). The deposit is taken not only in part payment of the purchase-money, but also as a guarantee for the due performance of the contract; and it is liable to be forfeited by the purchaser if he fail to carry out the agreement. This is the case, whether the stipulation for payment of the deposit expressly so provide, or not (*o*); and the fact that the deposit has been paid to a stakeholder, makes no difference in this respect (*p*). When the deposit is paid to an auctioneer, he receives it as stakeholder, being liable to pay

Forfeiture of deposit.

(*l*) *S. C.*, 1921, 1 K. B. 635 (Bankes & Atkin, L.JJ.). Scrutton, L.J., dissented on the ground that the agreement was against public policy and in restraint of trade as depriving the public of the advantage of free competition at auctions, and was therefore unenforceable. Scrutton, L.J., however, considered that the agreement was not unreasonable as between the parties thereto; see 1921, 1 K. B. 644. If so, it is difficult to see how the *public* were deprived of any advantage; the rest of the community were at liberty to bid, and the effect of the agreement was beneficial to them, as removing certain possible competitors out of their way. The vendor seems to be the only person truly prejudiced by such an agreement: but as to his position, see the previous note.

(*m*) *Binks* v. *Rokeby*, 2 Swans. 222; *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695, 701; 2 Dart, V. & P. 630, 5th ed.; 711, 6th ed.; 653, 7th ed.

(*n*) 1 Davidson, Prec. Conv. 519 and n. (*c*), 5th ed.; 1 Key & Elphinstone, Prec. Conv. 258 and n. (*b*), 4th ed.; 268 and n. (*d*), 10th ed.; below, Chap. III.

(*o*) *Howe* v. *Smith*, 27 Ch. D. 89; *Sprague* v. *Booth*, 1909, A. C. 576, 579, 580.

(*p*) *Hall* v. *Burnell*, 1911, 2 Ch. 551.

Payment of deposit to auctioneer—

it to the vendor, should the contract be completed or the purchaser break the contract, but to the purchaser, should the contract be broken by the vendor (*q*). The auctioneer is responsible for the sum deposited with him; and as he receives the deposit in this character and with this responsibility, and not as agent for either party, he is entitled to retain for his own benefit any interest he may make by the use of the money, whilst it remains in his hands. Until the purchase is completed, the auctioneer ought not to part with the deposit without the consent of the purchaser as well as of the vendor (*r*). Where the deposit is paid to the vendor's solicitor, it is generally received by him as agent for the vendor. In that case he cannot put it out at interest without accounting therefor to the vendor; and if the vendor demand payment of the deposit to himself, the solicitor will be bound to hand it over to him (*s*). If however the vendor's solicitor receive the deposit in the character of stakeholder, and not as the vendor's agent, he will be subject to the same responsibilities and enjoy the same advantages as any other stakeholder (*t*).

to vendor's solicitor.

Payment of deposit on sales by private contract.

Sometimes provision is made for payment of a deposit on sales by private contract. The insertion of such a condition is of great advantage to the vendor, owing to the rule that the deposit is a guarantee for the purchaser's performance of his agreement (*u*). To the purchaser, however, the payment of a deposit is correspondingly prejudicial; as it leaves him exposed to the danger of losing his deposit in a case where the Court, while refusing to enforce specific performance against him, will yet hold him to his bargain at law (*x*). A purchaser by private treaty should therefore take care not to bind himself by a stipulation for payment of a deposit, if he can possibly avoid doing so. And if the vendor refuse to sell except on condition of the payment of a deposit, the purchaser should on no account agree to the payment of the deposit to the vendor, or to the vendor's solicitor as his agent, but should insist on placing the deposit in the hands of a stakeholder. If the vendor's solicitors

(*q*) *Harington* v. *Hoggart,* 1 B. & Ad. 577. See below, Chap. XIX. § 1.
(*r*) 1 Dart, V. & P. 178, 5th ed.; 205, 6th ed.; 203, 7th ed.
(*s*) *Edgell* v. *Day,* L. R. 1 C. P. 80.
(*t*) *Wiggins* v. *Lord,* 4 Beav. 30; *Hall* v. *Burnell,* 1911, 2 Ch. 551.
(*u*) Above, p. 27.
(*x*) *Scott* v. *Alvarez,* 1895, 2 Ch. 603. See below, Chap. VI.

be of good repute, they may usually be accepted as holders of the deposit, the contract expressly providing that the same is to be paid to them *as stakeholders*. For if a purchaser submit to pay a deposit to the vendor's solicitors as the vendor's agents, he may find that the vendor can make no title to the property sold and is insolvent; and in such a case the purchaser will have no right to sue the solicitors for the recovery of his deposit (*y*).

Stamp on contract for sale of lands.

All contracts for the sale of land, whether made by formal memorandum or by letter (*z*), must be duly stamped; otherwise they cannot be given in evidence, except in criminal proceedings, and are not available for any purpose whatever. But they may be stamped after execution, and so received in evidence on payment of the proper duty and the appointed penalty (*a*).

(*y*) *Ellis* v. *Goulton*, 1893, 1 Q. B. 350.

(*z*) See *Gwythor* v. *Gordon*, 3 Times L. R. 461; *Carlill* v. *Carbolic Smoke Ball Co.*, 1892, 2 Q. B. 484, 489, 490, affirmed 1893, 1 Q. B. 256.

(*a*) Stat. 54 & 55 Vict. c. 39 (Stamp Act, 1891), ss. 14, 15, replacing 33 & 34 Vict. c. 97, ss. 15—17, and 17 & 18 Vict. c. 125, ss. 28, 29. Under the Stamp Act, 1891, agreements under hand only are, as a rule, chargeable with the duty of sixpence, which may be denoted by an adhesive stamp to be cancelled by the person by whom the agreement is first executed; and agreements under seal are chargeable, as deeds, with the duty of ten shillings; sect. 22 & 1st schedule. But by sect. 59:—

(1) Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration, *for the sale of any equitable estate or interest in any property whatsoever*, or for the sale of any estate or interest in any property, *except lands, tenements, hereditaments, or heritages*, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.

(2) Where the purchaser has paid the said *ad valorem* duty and before having obtained a conveyance or transfer of the property enters into a contract or agreement for the sale of the same, the contract or agreement shall be charged, if the consideration for that sale is in excess of the consideration for the original sale, with the *ad valorem* duty payable in respect of such excess consideration, and in any other case with the fixed duty of ten shillings or of sixpence, as the case may require.

(3) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer made to the purchaser or sub-purchaser, or any other person on his behalf or by his direction, shall not be chargeable with any duty, and the Commissioners, upon application, either shall denote the payment of the *ad valorem* duty upon the conveyance or transfer, or shall transfer the *ad valorem* duty thereto upon production of the contract or agreement, or contracts or agreements, duly stamped.

(4) Provided that where any such contract or agreement is stamped

Alterations in the contract.

Any alterations made, after a written contract for the sale of land has been signed, in the terms of the agreement must also be put into writing and signed, or the contract will not be enforceable in its altered form (*b*); and such further writing must be stamped as a new agreement.

with the fixed duty of ten shillings or of sixpence, as the case may require, the contract or agreement shall be regarded as duly stamped for the mere purpose of proceedings to enforce specific performance or recover damages for the breach thereof.

(5) Provided also that where any such contract or agreement is stamped with the said fixed duty, and a conveyance or transfer made in conformity with the contract or agreement is presented to the Commissioners for stamping with the *ad valorem* duty chargeable thereon within the period of six months after the first execution of the contract or agreement, or within such longer period as the Commissioners may think reasonable in the circumstances of the case, the conveyance or transfer shall be stamped accordingly, and the same, and the said contract or agreement, shall be deemed to be duly stamped. Nothing in this provision shall alter or affect the provisions as to the stamping of a conveyance or transfer after the execution thereof.

(6) Provided also, that the *ad valorem* duty paid upon any such contract or agreement shall be returned by the Commissioners in case the contract or agreement be afterwards rescinded or annulled, or for any other reason be not substantially performed or carried into effect, so as to operate as or be followed by a conveyance or transfer.

By the Revenue Act, 1909 (stat. 9 Edw. VII. c. 43), s. 7, the limitation of the above enactment to contracts and agreements made in England, Ireland or Scotland, ceased to have effect.

The provisions of sect. 59, sub-sect. 1 of the Stamp Act, 1891, have been considered in *Smelting Co. of Australia, Ld.* v. *Commrs. of Inland Revenue,* 1897, 1 Q. B. 175; *West London Syndicate, Ld.* v. *Commrs. of Inland Revenue,* 1898, 2 Q. B. 507; *Farmer & Co., Ld.* v. *Commrs. of Inland Revenue,* 1898, 2 Q. B. 141 (contract made in England for sale of equity of redemption of lands in New South Wales held chargeable with *ad valorem* duty); *Chesterfield Brewery Co.* v. *Inland Revenue Commrs.,* 1899, 2 Q. B. 7; *Danubian Sugar Factories, Ld.* v. *Inland Revenue Commrs.,* 1901, 1 Q. B. 245; *Inland Revenue Commrs.* v. *Muller, &c. Ld.,* 1901, A. C. 217; *Velasquez, Ld.* v. *Inland Revenue Commrs.,* 1914, 3 K. B. 458.

The practical result appears to be that contracts for sale of any legal estate or interest in any lands, tenements or hereditaments are only chargeable with the stamp duty of sixpence or ten shillings according as they are under hand or seal. While contracts (wherever made) for sale of any equitable estate or interest in any property whatsoever, including lands wherever situate, are chargeable with *ad valorem* duty, but may be stamped with the fixed duty of sixpence or ten shillings, if a further conveyance of the estate or interest sold be contemplated. To leave the last-mentioned contracts unstamped would appear to involve the risk of having to pay double the *ad valorem* duty on stamping after execution; see sect. 15 of the Stamp Act, 1891.

(*b*) See below, Chap. XVIII. § 1.

CHAPTER II.

OF THE PARTIES' RIGHTS, OBLIGATIONS AND REMEDIES, GENERALLY.

HAVING considered the formation of a contract for the sale of land, let us pass on to examine its terms. As we have seen (*a*), such contracts generally contain special stipulations varying the rights and obligations of the parties as defined by law. And a conveyancer's business in connection with sales of land includes drawing up the conditions of a sale by auction, a task in which he is engaged exclusively in the vendor's interest; arranging the terms of a private contract, when he may be acting for either party; making requisitions on title for the purchaser or answering them on the vendor's behalf; and settling the conveyance on either side. It is obvious that these duties cannot be efficiently discharged without an accurate knowledge of the position of the parties to any open contract, and a clear understanding of the conditions generally made in more formal agreements. Our object therefore will be to ascertain the rights and obligations implied by law on a contract to sell land, when the parties, the property and the price are the only terms defined; and to consider at the same time the stipulations by which the contractors' legal relations are commonly modified. And our design is first to take a general view of the contract and the remedies for enforcing it, and then to examine more fully each incident of the sale in turn, as far as possible, in order of time according as each part of the contract has to be performed.

Conveyancers' duties on sales.

When two persons have entered into the relation of vendor and purchaser by duly signing a contract for the sale of land, their chief duties are these:—The vendor is bound to show a good title to the property sold (*b*), and for that purpose to deliver at

Outline of the effect of the contract.

Vendor's duty to prove title.

(*a*) Above, p. 16.

(*b*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Souter* v. *Drake*, 5 B. & Ad. 992; *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695, 701; *Lysaght* v.

Abstract of title.

his own expense to the purchaser a proper abstract of title to the property, showing the dealings therewith and devolution thereof during the period for which title is by law or express agreement required to be shown (*c*). In the absence of special stipulation this period is, as a rule, forty years (*d*). The vendor is also bound to verify the abstract by producing proper evidence of all the deeds, wills and other documents appearing on the abstract and of all material facts stated therein, such as births, deaths, marriages or bankruptcies (*e*); and he is bound to prove the identity of the property sold with that to which the docu-

Verification of abstract.

Vendor's obligation to show good title is an essential term of the contract.

Edwards, 2 Ch. D. 499, 507; *Ellis* v. *Rogers,* 29 Ch. D. 661, 670, 672. In the last-mentioned case, Cotton, L. J., suggested a question whether the right to a good title is an implied term in the contract or a collateral right given by the law. It is submitted, however, that the obligation to show a good title on a sale of land is not an undertaking collateral to, in the sense of independent of, the main contract. Cotton, L. J., quoted the authority of Lord St. Leonards (Sug. V. & P. 16) and Parke, B. (*Doe* d. *Gray* v. *Stanion,* ubi sup.), for the view that this obligation is an implied term of the contract. The opposite view he rested upon a *dictum* of Grant, M. R., in *Ogilvie* v. *Foljambe,* 3 Mer. 53, 64. On examining this *dictum,* however, it appears that Grant, M. R., meant to say nothing more than that in the particular case before him the purchaser's right to have a good title was not provided for by the written agreement between the parties. It is true that he spoke of the *controversy* between the parties, as to what title the purchaser could require, as being collateral to the agreement, because no term in the written agreement was sought to be varied or added to; and said that the right to a good title was a right not growing out of the agreement between the parties but given by law. But this surely means no more than that, in the particular case before him, the extent of the purchaser's right to require a good title was a matter depending, not on the express, but on the implied terms of the contract. As the failure to show a good title, on the sale of land, is such a breach of contract as discharges the purchaser from the necessity of performing his part of the agreement, it seems clear that the obligation to show a good title is an integral part of the agreement; see *Duke of St. Albans* v. *Shore,* 1 H. Bl. 270, 278; *Seaward* v. *Willock,* 5 East, 198, 202; *Souter* v. *Drake, Ellis* v. *Rogers,* ubi sup.; *Brewer* v. *Broadwood,* 22 Ch. D. 105, 109; *Stickney* v. *Keeble,* 1915, A. C. 386, 403, 416; *McGrory* v. *Alderdale Estate Co.,* 1918, A. C. 503, 507-509, 511, 512; below, Chap. XVIII., § 2. This would not be the case, if the obligation to prove title were strictly collateral to the contract of sale. Breach by the vendor of a *strictly collateral* warranty upon a sale does not discharge the purchaser from the main contract, as in the case of a warranty of quality on the sale of specific goods, where the buyer has had the opportunity of inspecting them; *Street* v. *Blay,* 2 B. & Ad. 456; *Heyworth* v. *Hutchinson,* L. R. 2 Q. B. 447; Benjamin on Sale, 448, 741, 748, 749, 2nd ed.; Sale of Goods Act, 1893 (stat. 56 & 57 Vict. c. 71), ss. 53, 62 (1); see below, Chap. XIV., § 1.

(*c*) Sug. V. & P. 406; *Re Johnson and Tustin,* 30 Ch. D. 42.

(*d*) Stat. 37 & 38 Vict. c. 78, s. 1.

(*e*) Sug. V. & P. 406, 414 et seq., 447—450; 1 Dart, V. & P. 142, 143, 310 et seq., 407, 5th ed.; 159, 160, 350 et seq., 470, 6th ed.; 155, 156, 345 et seq., 481, 7th ed.; 1 Davidson, Prec. Conv. 550, 4th ed.; 457, 5th ed.

ments of title relate (*f*). But the purchaser, in the absence of stipulation to the contrary, must now bear the expense of producing all documents of title, which are not in the vendor's possession (*g*), and of procuring all other evidence of title which the vendor has not in his possession (*h*). The purchaser also bears all expense of the examination of the title deeds by his solicitor (*i*). The vendor is further bound to produce land corresponding substantially in all respects with the description contained in the contract and available to be transferred to the purchaser in fulfilment of the agreement (*k*). If the title shown be accepted, the vendor is bound to convey the property to the purchaser free from all incumbrances: unless of course the purchaser should have agreed to take the property subject to any specified incumbrances (*l*). The vendor is therefore bound, on payment of the purchase-money, to execute a proper deed of conveyance to the purchaser of the estate sold (*m*), and to put the purchaser into possession of the land so assured (*n*). And in the deed of conveyance the vendor must give the usual vendor's covenants for title (*o*). But the purchaser must bear the expense of preparing this conveyance; although, in the absence of special stipulation, the expense of the concurrence therein of all necessary parties other than the vendor (such as mortgagees or incumbrancers) and of the execution thereof by the vendor will fall on the vendor (*p*). The vendor is also bound to hand over

Vendor's duty to produce the land sold—

to convey—

and give possession—

to covenant for title;—

(*f*) *Flower* v. *Hartopp*, 6 Beav. 476; *Curling* v. *Austin*, 2 Dr. & Sm. 129; 1 Davidson, Prec. Conv. 557, 4th ed., 463, 5th ed.

(*g*) See *Re Willett and Argenti*, 5 Times L. R. 476; *Re Stuart & Olivant and Seadon's Contract*, 1896, 2 Ch. 328.

(*h*) Stat. 44 & 45 Vict. c. 41, s. 3, sub-s. 6, reversing the previous rule.

(*i*) Sug. V. & P. 406, 429, 430; Wms. Conv. Stat. 47—50.

(*k*) See *Halsey* v. *Grant*, 13 Ves. 73, 77—79; *Flight* v. *Booth*, 1 Bing. N. C. 370; *Re Arnold*, 14 Ch. D. 270; *Jacobs* v. *Revell*, 1900, 2 Ch. 858; *Re Hare and O'More's Contract*, 1901, 1 Ch. 93; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258; *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412; *Lee* v. *Rayson*, 1917, 2 Ch. 613; *McGrory* v. *Alderdale Estate Co.*, 1918, A. C. 503, 507, 510, 512; below, Chap. XII., § 4.

(*l*) Wms. Real Prop. 452, 13th ed.; 653, 654, 23rd ed.

(*m*) *Re Cary Elwes' Contract*, 1906, 2 Ch. 143, 149.

(*n*) *Engell* v. *Fitch*, L. R. 4 Q. B. 659; *Royal Bristol, &c. Building Society* v. *Bomash*, 35 Ch. D. 390; *Jones* v. *Gardiner*, 1902, 1 Ch. 191, 195, 196.

(*o*) See post, p. 43.

(*p*) Sug. V. & P. 561, see 557-8; Dart, V. & P. 707, 721, 722, 5th ed.; 798, 814, 6th ed.; 714, 723, 7th ed.; 1 Davidson, Prec. Conv. 570-2, 612, 4th ed., 477-9, 5th ed.; *Re Sander and Walford's Contract*, 1900, W. N. 183; 83 L. T. 316.

and hand over title deeds.

to the purchaser on completion all deeds and other muniments of title relating solely to the property purchased (*q*); and must, as a rule, furnish the purchaser, at the purchaser's expense (*r*), with a proper statutory acknowledgment of right to production and undertaking for safe custody of all such documents, necessary to make a good title, as may be withheld from the purchaser, either because they relate to other property retained by the vendor or because their custody rightly belongs to some other person than the vendor (*s*). The chief duties of the purchaser under a contract for sale of land are to examine the evidence of title offered by the vendor, and if and when a good title is shown, to accept the title (*t*), to prepare a conveyance of the property and tender the same to the vendor for his execution, and thereupon to pay the price (*u*) and to take the conveyance accordingly (*x*).

Purchaser's duties.

Proof of title.

The most prominent term of the contract is that which requires the vendor to show a good title. This obligation is the cause of most of the disputes and litigation between buyers and sellers of land. As is well known, the procedure usually adopted to secure the fulfilment of the vendor's duties is for the purchaser's advisers, after they have perused the abstract of title, to send in written requisitions dealing with the points in which they consider the title to be deficient or insufficiently proved or the vendor's obligations to be otherwise imperfectly discharged. To these requisitions the vendor returns written answers confessing or repudiating his liability to comply with them, as the case may be. Unless he accede to every requisition, his answers will evoke replies from the other side; and these again will demand further response. So the contest continues until all grounds of difference are removed, the title is accepted, and the parties proceed to completion, or the questions on which neither party

Requisitions and answers.

(*q*) Sug. V. & P. 407, 433; *Re Duthy and Jesson's Contract,* 1898, 1 Ch. 419.

(*r*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 4).

(*s*) *Cooper* v. *Emery,* 1 Ph. 388; Sug. V. & P. 446—450, 453; stat. 44 & 45 Vict. c. 41, s. 9; the vendor must also furnish the purchaser with attested copies of such last-mentioned muniments of title, if the purchaser require them, but at the purchaser's expense; stat. 44 & 45 Vict. c. 41, s. 3 (6).

(*t*) Cozens-Hardy, M. R., *Re Taylor,* 1910, 1 K. B. 562, 571, 572.

(*u*) *Baxter* v. *Lewis,* Forrest, 61; *Martin* v. *Smith,* 6 East, 555; *Poole* v. *Hill,* 6 M. & W. 835; Sug. V. & P. 240, 241.

(*x*) *Re Cary Elwes' Contract,* 1906, 2 Ch. 143.

will give way are submitted to the determination of the Court. In advising as to the conduct of these negotiations, it is of course of the highest importance to know when to insist and when to yield. On each point the conveyancer's attitude will be determined by the countenance he may expect his contention to receive from the Court, in case he should fail to convince his opponent; and at every step he must consider the alternative of submission or litigation. It is thought therefore that, before entering into a detailed examination of the terms of the contract, it will be well to take a brief survey of the remedies provided to secure its performance and of the principles on which the Court will administer relief against its breach (*y*).

Remedies for breach of the contract.

In the case of a breach of any of the main duties of the contract (*i.e.*, those duties of which the performance by one of the contractors is a condition precedent to the other party's liability, as for the vendor to show a good title to or to convey the property sold or for the purchaser to pay the price (*z*)), the party injured is at liberty, where the contractors can be restored to their former position, either to rescind the contract and to obtain *restitutio in integrum* including the return of any property transferred and the reimbursement of the expenses incurred by him in consequence of the contract, or to affirm the contract and recover damages thereunder for the breach. These rights are given by the common law: but the party electing to rescind the contract for such a cause may either bring an action for the required return of property or reimbursement of money under the common law jurisdiction of the Court, or sue under its equitable jurisdiction to enforce rescission and procure the consequent restitution. Where the contract has been so far performed that *restitutio in integrum* is impossible, or where the duty broken is such that its performance is *not* a condition precedent to the other party's liability, the party aggrieved is not entitled to rescind the contract, and his only remedy *at common law* is to sue for damages in affirmance of the contract (*a*). The damages recoverable by a vendor of land for breach of the contract for sale are governed by the general common law rule as to the measure of damages, by which the

1. Rescission and *restitutio in integrum*.

2. Action for damages.

Damages recoverable by the vendor—

(*y*) The remedies for breach of the contract are fully discussed below, Chap. XIX.

(*z*) See above, pp. 31, and n. (*b*), 32-34.

(*a*) See below, Chap. XIX., §§ 1, 2.

parties are to be placed in the same position, so far as can be attained by a money payment, as if the agreement had been actually performed (*b*). Thus if the vendor have conveyed the land to the purchaser without receiving payment, he can recover the whole price. But if he sue at law for breach of contract, without having parted with his legal estate in the land, he cannot recover the full price as damages, but is limited to the amount of the loss he has actually sustained (*c*). The damages recoverable at law by a purchaser of land for breach of the contract are regulated by an exceptional principle; and, as a rule, he is not enabled to recover any damages for loss of his bargain, but can only obtain reimbursement of his expenses of investigating title, &c. and the amount of his deposit, if any (*d*). This exception to the common law rule regarding damages for breach of contract seems to have been allowed in consideration of the difficulties attending the fulfilment of the vendor's obligation to show a good title. But the most effective remedy of either party is one which the common law did not afford, and which is granted or withheld on principles entirely different from those of the parties' *legal* liability for breach of their agreement—that is, to enforce the specific performance of the contract under the equitable jurisdiction of the Court. The administration of this relief, though in unobjectionable cases it is granted as much of course as damages are given at law (*e*), is nevertheless held to be in the discretion of the Court—a discretion however which is not arbitrary or capricious, but judicial, to be exercised according to fixed rules and principles (*f*). To obtain a decree of specific performance is not a matter depending merely on proof of the contract and refusal to perform it, but the Court will have regard to circumstances outside the contract, and especially to the conduct of the parties, and, considering these,

by the purchaser.

3. Action for specific performance.

(*b*) Parke, B., *Robinson* v. *Harman*, 1 Ex. 850, 855; *Wall* v. *City of London Real Property Co.*, L. R. 9 Q. B. 249, 253; see below, Chap. XIX., § 2.

(*c*) *Laird* v. *Pim*, 7 M. & W. 474.

(*d*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Bain* v. *Fothergill*, L. R. 7 H. L. 158; *Keen* v. *Mear*, 1920, 2 Ch. 574, 581; see below, Chap. XIX., § 2.

(*e*) Grant, M. R., *Hall* v. *Warren*, 9 Ves. 605, 608; *Hexter* v. *Pearce*, 1900, 1 Ch. 341, 346; *Rudd* v. *Lascelles*, ib. 815, 817.

(*f*) Eldon, C., *White* v. *Damon*, 7 Ves. 30, 35; Romilly, M. R., *Haywood* v. *Cope*, 25 Beav. 140, 151; Lord Chelmsford, *Lamare* v. *Dixon*, L. R. 6 H. L. 414, 423; *Holliday* v. *Lockwood*, 1917, 2 Ch. 47, 56, 57.

will determine whether it is equitable (that is, in accordance with the principles by which Courts of Equity are guided) to grant the desired relief or not (*g*). Thus it is that in deciding whether the specific performance of a contract should be enforced, the Court enters into considerations, which it would not examine in adjudging what relief either party should have for a breach of the same contract at law (*h*). For example, a vendor of land will not be entitled to enforce specific performance of the contract unless his conduct has conformed to the standard of fair dealing, which the Courts of Equity have set; although he may be allowed at the same time to stand upon his contractual rights at common law, and to exact his full measure of compensation thereunder. If therefore special stipulations restrictive of the purchaser's rights be inserted in the contract in a manner which a Court of Equity regards as unfair, the Court will not grant specific performance of the contract at the instance of the vendor (*i*); notwithstanding that the vendor may be able to insist on those same stipulations in any proceedings in which the relief administered is determined solely by the rules of law (*k*). So also the Court may decline to enforce the specific performance of a contract on the ground that this would involve great hardship on the contractor in default, but may at the same time adjudge him to be liable in damages for a breach of the agreement (*l*). Besides an action for damages at law or specific performance in equity, there is another proceeding in which questions arising between vendors and purchasers of land may be decided. This is a summons under section 9 of the Vendor and Purchaser Act, 1874 (*m*). In such a summons the rights of the parties may be measured by the rules of equity or law, according to the relief claimed. Questions, of which the solution must result in binding either party to complete the purchase (as where it is claimed that the vendor has shown such a title as the purchaser is bound to accept), are determined according to the rules of equity applied in actions for specific

Unfairness.

Hardship.

4. Vendor and purchaser summons.

(*g*) *Clowes* v. *Higginson*, 1 V. & B. 524, 527; *Lamare* v. *Dixon*, L. R. 6 H. L. 414, 423, 428.

(*h*) See below, Chap. XIX., § 3.

(*i*) *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*k*) *Re Davis and Cavey*, 40 Ch. D. 601, 607; *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Scott* v. *Alvarez*, 1895, 2 Ch. 603; see below, Chap. VI.

(*l*) See *Tamplin* v. *James*, 15 Ch. D. 215, 222, 223; *Van Praagh* v. *Everidge*, 1902, 2 Ch. 266, 272, 273, reversed on a different point, 1903, 1 Ch. 434; below, Chap. XIII., § 1.

(*m*) Stat. 37 & 38 Vict. c. 78.

performance. But if the purchaser claims not only to be relieved from performing the contract, but also to have his deposit (if any) returned to him, and his expenses of investigating the title paid, he is virtually pursuing the remedy accorded for breach of the contract in a Court of law (*n*); and his title to relief will be governed strictly by the rules of law, without reference to the considerations which would guide the Court in granting or withholding specific performance (*o*).

To give a clearer view of the terms implied by law in an open contract of sale, the writer has endeavoured to express them in a manner similar to that in which special conditions of sale are usually drawn. This will facilitate the comparison of the terms of an open contract with those of a formal agreement containing the usual conditions. It will be remembered that the Statute of Frauds requires a written and signed memorandum describing (at least) the parties, the property sold and the price (*p*). This may take the following form:—

Formal memorandum of an open contract.

> MEMORANDUM OF AN AGREEMENT made this first day of May, 1898, between A. B., of &c. [*Insert description*] and C. D., of &c. [*Insert description*] whereby the said A. B. agrees to sell and the said C. D. to buy at the price of 4,000*l.*, the freehold in fee simple free from incumbrances of ALL THAT &c. [*Insert description of the property*]. In witness whereof the said parties have hereunto set their hands the day and year above named.
>
> (Signed) A. B.
> C. D.

Contract formed by letters.

Open contracts, however, are very rarely made by the signature of a formal memorandum. They usually result from the acceptance of a written offer, as thus:—

> THE WHITE HOUSE,
> GREENFIELD, SUSSEX.
> 1 *June*, 1898.
>
> DEAR SIR,
>
> I would take 4,500*l.* for this house with the garden and two fields adjoining.
>
> Yours faithfully,
> A. B.
>
> C. D., Esq.

(*n*) Above, p. 35; *Re Hargreaves and Thompson's Contract*, 32 Ch. D. 454.

(*o*) See the cases cited in note (*k*), p. 37; below, Chap. XIX., § 4.

(*p*) Above, pp. 3, 16.

10, Blank Street, W.
2 *June*, 1898.

Dear Sir,

I accept the offer made in your letter of yesterday.

Yours faithfully,

C. D.

A. B., Esq. (*q*).

The uncumbered fee simple contracted for, unless the contrary appear.

In such cases it is understood that the interest sold is the freehold in fee simple free from incumbrances, unless it appear from the memorandum that some lesser interest is the subject of the contract, or that the purchaser is to take the property subject to certain incumbrances (*r*). Whether the memorandum of an open contract be formal or informal, the agreement comprises the following terms:—

Terms of an open contract.

Vendor to show a good title.

1.—(1.) The vendor shall show a good title to the property sold.

Delivery and verification of abstract.

(2.) In order to discharge this obligation, he shall deliver at his own expense to the purchaser a proper abstract of title to the property, showing the dealings therewith and devolution thereof for the forty years next before the contract, and shall verify the abstract by producing proper evidence of all the deeds, wills and other documents appearing on the abstract and of all material facts stated therein, and shall prove the identity of the property described in the contract with that to which the muniments of title relate (*s*).

Proof of identity.

Necessity of a good root of title.

(3.) The vendor shall prove forty years' seisin in fee of the property sold. If therefore an instrument of disposition be offered in unsupported proof of the commencement of the vendor's title, it must be a good root of title; that is to say, it must deal with or prove on the face of it, without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the property sold, contain a description by which the property can be identified, and show nothing to cast any doubt on the title of the disposing parties. Otherwise, any deficiency

(*q*) See above, pp. 8, 17.

(*r*) *Hughes* v. *Parker*, 8 M. & W. 244; *Bower* v. *Cooper*, 2 Hare, 408; Sug. V. & P. 298; *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; and see *Hughes* v. *Jones*, 3 De G., F. & J. 307, 313, 314.

(*s*) Above, pp. 32, 33; *Re Wallis and Grout's Contract*, 1906, 2 Ch. 206.

in any of the above respects must be made good by further evidence (*t*).

Proper evidence of title.

(4.) Proper evidence of title means such evidence as a court of equity will force a purchaser to accept on a sale, whether admissible in litigation or not (*u*).

Recitals, &c. in instruments twenty years old to be *primâ facie* evidence.

(5.) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions (*x*).

Production of and inquiries as to the title earlier than for the last forty years not to be required or made.

(6.) The purchaser shall not require the production, or any abstract or copy, of any deed, will, or other document dated or made before the time prescribed by law or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed, will, or other document forming part of that prior title are correct and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise (*y*).

Vendor must produce a property identical with that described in the contract.

2.—(1.) The vendor shall also produce, as available to be transferred to the purchaser in fulfilment of the contract, a piece or pieces of land substantially identical as respects tenure, incidents of tenure, estate, situation, quantity and otherwise, with the property described in the contract (*z*).

(*t*) *Parr* v. *Lovegrove*, 4 Drew. 170; 1 Dart, V. & P. 295, 296, 5th ed.; 337, 6th ed.; 331, 7th ed.; *Re Cox & Neve's Contract*, 1891, 2 Ch. 109, 118.
(*u*) See below, Chap. IV., sect. 3.
(*x*) V. & P. Act, 1874, stat. 37 & 38 Vict. c. 78, s. 2 (rule 2).
(*y*) Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 3 (3).
(*z*) Above, p. 33.

Substantial errors of description to the purchaser's detriment.

(2.) If the property, which the vendor is able to convey in fulfilment of the contract for sale, shall not be substantially identical with the property described in the contract, the vendor shall not enforce the contract at law or in equity, and the purchaser may treat the contract as broken (*a*); but if in such case there be a mere deficiency (*b*) (whether of estate, area or otherwise) capable of assessment at a money value, the purchaser may in equity exact the specific performance of the contract with compensation for the deficiency, provided this will not prejudice third parties (*c*), or involve great hardship on the vendor (*d*).

Insubstantial errors of description of the same kind.

(3.) If the property available to be conveyed by the vendor in fulfilment of the contract shall correspond substantially with that described therein, but owing to an error innocently made by the vendor there shall be some small and insubstantial deficiency either of quantity or estate or in some other respect, the vendor (though he shall not enforce the contract at law), may nevertheless in equity exact the specific performance thereof, on giving compensation for the error (*e*); and the purchaser shall have the like right to enforce specific performance with compensation (*f*), but shall not be entitled to insist on his legal right to rescind the contract or recover damages for its breach (*g*), if the vendor shall be willing to make compensation and shall assert his own right to specific performance on those terms (*h*).

(*a*) *Flight* v. *Booth,* 1 Bing. N. C. 370; *Pulsford* v. *Richards,* 17 Beav. 87, 95, 96; *Swaisland* v. *Dearsley,* 29 Beav. 430; *Torrance* v. *Bolton,* L. R. 8 Ch. 118; *Re Arnold,* 14 Ch. D. 270; *Re Beyfus and Masters' Contract,* 39 Ch. D. 110; *Re Fawcett and Holmes' Contract,* 42 Ch. D. 150; *Jacobs* v. *Revell,* 1900, 2 Ch. 858; *Re Hare and O'More's Contract,* 1901, 1 Ch. 93; *Lee* v. *Rayson,* 1917, 1 Ch. 613; Dart, V. & P. 134, 135, 1072—1078, 5th ed.; 151, 152, 1198—1205, 6th ed.; 147, 1086—1092, 7th ed.; Fry, Sp. Perfce. §§ 1209, 1217—1238.

(*b*) See *Rutherford* v. *Acton-Adams,* 1915, A. C. 866, 870.

(*c*) *Thomas* v. *Dering,* 1 Keen, 729, 6 L. J. N. S. Ch. 267; *Willmott* v. *Barber,* 15 Ch. D. 96.

(*d*) *Mortlock* v. *Buller,* 10 Ves. 292, 315; *Castle* v. *Wilkinson,* L. R. 5 Ch. 534, 536; *Hooper* v. *Smart,* L. R. 18 Eq. 683; *Horrocks* v. *Rigby,* 9 Ch. D. 180; Fry, Sp. Perfce. §§ 1209, 1210, 1257 *sq.*; *Rudd* v. *Lascelles,* 1900, 1 Ch. 815.

(*e*) *Calcraft* v. *Roebuck,* 1 Ves. jun. 221; Fry, Sp. Perfce. §§ 1213, 1229—1238; *Shepherd* v. *Croft,* 1911, 1 Ch. 521.

(*f*) This follows, *a fortiori,* from the proposition stated in the preceding paragraph.

(*g*) At law the vendor's failure in any respect, however small, to produce a property answering to that described in the contract is a breach of one of his main duties under the agreement; see above, pp. 33, and n. (*k*), 35, Chap. XIII. § 1.

(*h*) This is a consequence of the vendor's right to enforce specific

Errors of description made by the vendor to his own detriment.

(4.) If the vendor by his own fault or inadvertence shall have described in the contract of sale a property more extensive than that which he meant to sell, and is able to convey the property described in fulfilment of the agreement, then (whether the error be substantial or insubstantial) he shall have no right to enforce the contract at law or specifically otherwise than according to its terms or to oblige the purchaser to allow him compensation (*i*); and in case of the vendor's refusal so to perform the contract, the purchaser shall be entitled, not only to insist on his legal rights (*k*) arising from the vendor's breach, but also to enforce the contract specifically (*l*); except that, if the error were innocently made and be so serious that it would be a great hardship on the vendor to oblige him to perform the contract specifically, the purchaser shall not be entitled to enforce specific performance unless he choose to take without compensation what the vendor really intended to sell (*m*).

Place of verification of the abstract.

3.—(1.) The vendor shall produce all the evidence of title, which is in his own possession, at the proper place for verification of the abstract, that is to say, either at his own residence, or upon or near the property sold, or in London; or he shall pay the extra expense occasioned to the purchaser by the examination of any such evidence elsewhere; but he may produce any documents of title, which are in the possession of other persons than himself, at the place where such documents are, and the purchaser shall pay any extra expense so caused of the examination of such documents by him or his solicitor (*n*).

performance with compensation, and of the prevalence of this equitable right over the purchaser's rights at common law; see *Reynolds* v. *Nelson*, 6 Madd. 290; *Frank* v. *Basnett*, 2 My. & K. 618; *Phelps* v. *Prothero*, 7 De G., M. & G. 722; Hall, V.-C., *Tredegar* v. *Windus*, L. R. 19 Eq. 607, 615; Judicature Act, 1873, stat. 36 & 37 Vict. c. 66, ss. 24 (5), 25 (11).

(*i*) See *Manser* v. *Back*, 6 Hare, 443, 447, 448; *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1, 8; below, Chap. XII. § 4.

(*k*) Above, pp. 35, 36.

(*l*) See *Tamplin* v. *James*, 15 Ch. D. 215, 222, 223; below, Chap. XIII. § 1.

(*m*) *Neap* v. *Abbott*, C. P. Coop. 333; *Manser* v. *Back*, 6 Hare, 443; *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1; *Wood* v. *Scarth*, 2 K. & J. 33; *Scott* v. *Littledale*, 8 E. & B. 815; *Webster* v. *Cecil*, 30 Beav. 62; *Durham* v. *Legard*, 34 Beav. 611; *Rudd* v. *Lascelles*, 1900, 1 Ch. 815, 820; see below, Chap. XII. § 4; Chap. XIII. § 1.

(*n*) *Sharp* v. *Page*, Sug. V. & P. 430; *Hughes* v. *Wynne*, 8 Sim. 85; Sug. V. & P. 429, 430; 1 Dart, V. & P. 407, 408, 5th ed.; 470, 471, 6th ed.; 481, 482, 7th ed.; Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 3 (6).

(2.) The purchaser shall pay the expense of procuring and producing all evidence of title which he may require but which is not in the vendor's possession (*o*). Expense of evidence not in vendor's possession.—

(3.) The vendor shall at his own expense procure all documents of title, which are required by law to be stamped but are unstamped or insufficiently stamped, to be properly stamped (*p*). And of stamping unstamped documents.

4. The purchaser shall at his own expense examine the abstract of title and the evidence offered in support of it; and if and so soon as a good title shall be shown, he shall accept the title (*q*). Purchaser to accept the title, if shown to be good.

5.—(1.) The purchase shall be completed so soon as the vendor shall have shown a good title, that is to say, when the title contracted for shall have been proved upon the abstract and by all the evidence necessary to verify the same (*r*). The purchaser shall thereupon prepare at his own expense a proper conveyance of the property to the purchaser or as he shall direct (*s*), and shall tender the same to the vendor for execution, at the same time tendering the whole amount due in payment of the purchase-money (*t*); and the vendor shall thereupon accept such payment and execute the conveyance at his own expense and shall give possession of the property to the purchaser (*u*), and the purchaser shall take such conveyance accordingly (*x*). Completion of the purchase.

(2.) A proper conveyance of the property means an assurance effectual to vest the whole estate contracted for, both legal and equitable, in the purchaser or his nominee, and containing the usual covenants for title by the vendor. These are covenants for right to convey, quiet enjoyment, freedom from incumbrances and further assurance, extending to indemnity against anything done, omitted or knowingly suffered by the vendor and his predecessors in title back to and including the last person

(*o*) This is the effect of Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 3 (6); see *Re Willett and Argenti*, 5 Times L. R. 476; *Re Stuart, Olivant and Seadon's Contract*, 1896, 2 Ch. 328; *Re Conlon and Faulkener's Contract*, 1917, 1 I. R. 241; *Re Wright and Thompson's Contract*, 1920, 1 Ch. 191; and cf. *Re Moody and Yates's Contract*, 30 Ch. D. 344, 348, 349.

(*p*) *Whiting* to *Loomes*, 14 Ch. D. 822, 17 Ch. D. 10; *Re Lovell and Collard's Contract*, 1907, 1 Ch. 249.

(*q*) Above, p. 34.

(*r*) Above, pp. 27, 33.

(*s*) *Egmont* v. *Smith*, 6 Ch. D. 469, 474.

(*t*) Above, p. 34.

(*u*) Above, p. 33.

(*x*) *Re Cary Elwes' Contract*, 1906, 2 Ch. 143.

who became entitled to the property on a sale or another occasion on which proper covenants for title were given (*y*).

(3.) If the state of the vendor's title be such that, in order to convey to the purchaser the whole estate contracted for, other parties than the vendor must join in the conveyance, the vendor shall at his own expense procure all such other necessary parties to join in and execute the conveyance (*z*).

(4.) The vendor shall, before the completion of the purchase, do what is requisite on his part for enabling the purchaser to procure the contract or the conveyance to be stamped with the Particulars Delivered stamp (*a*).

Vendor to deliver over the muniments of title on completion.

6.—(1.) The vendor shall deliver to the purchaser on completion all muniments of title relating solely to the property purchased (*b*), but he shall retain any documents of title which are in his own possession and relate to any part of an estate retained by him as well as to the property sold (*c*): and he shall not be required to obtain and hand over to the purchaser any documents of title, which relate to other property as well as to the property sold, and of which any person other than the vendor is entitled to retain possession (*d*).

Or give proper statutory acknowledgments and undertakings as to any documents of title rightfully retained.

(2.) The vendor shall give or procure to be given to the purchaser proper statutory acknowledgments of right to production and delivery of copies, and proper statutory undertakings for safe custody, and also (if required by the purchaser, but at his expense) attested copies of all such documents of title as are not handed over to the purchaser on completion and are necessary to make a good title according to the contract; except documents in public or official custody and other documents, not being in the vendor's possession or power, of which the purchaser can always obtain good evidence himself: but the purchaser shall not require any fresh acknowledgment, undertaking or covenant

(*y*) *Church* v. *Brown*, 15 Ves. 258; Williams, Real Prop. 447—449, 13th ed.; 666—669, 23rd ed.; Williams, Conv. Stat. 74—86.

(*z*) *Esdaile* v. *Oxenham*, 3 B. & C. 225, 228, 229; Sug. V. & P. 557, 558, 561; 2 Dart, V. & P. 707, 721, 722, 5th ed.; 798, 814, 6th ed.; 714, 723, 7th ed.; 1 Davidson, Prec. Conv. 572, 612, 4th ed.; *Re Sander and Walford's Contract*, 1900, W. N. 183, 83 L. T. 316.

(*a*) See stat. 10 Edw. VII. c. 8, ss. 1, 4, 11, as amended by 10 & 11 Geo. V. c. 18, ss. 57, 64 (3); below, Chap. XII. § 3.

(*b*) Above, p. 34; below, Chap. XII. § 3.

(*c*) V. & P. Act, 1874, stat. 37 & 38 Vict. c. 78, s. 2 (rule 5); see below, Chap. XII. § 3.

(*d*) Sug. V. & P. 446—450, 453; 1 Dart, V. & P. 626, 6th ed.; 578, 7th ed.

to be given to him as regards any documents lawfully retained by some other person than the vendor, for the production and safe custody whereof the purchaser will on completion have the right to enforce at law a proper statutory acknowledgment and undertaking or a covenant given to the vendor or his predecessor in title (*e*).

(3.) A proper statutory acknowledgment or undertaking can only be given by the person who retains possession of the documents (*f*).

(4.) Such statutory acknowledgments and undertakings as the purchaser can and shall require shall be furnished at his expense; but the vendor shall bear the expense of the perusal and execution thereof on behalf and by himself and all necessary parties other than the vendor (*g*).

(5.) The inability of the vendor to furnish the purchaser with proper statutory acknowledgments and undertakings with regard to any documents of title shall not be an objection to title in case the purchaser will on completion of the contract have an equitable right to the production of such documents (*h*).

Time for carrying out the contract.

7.—(1.) Any act necessary to be done by either party in order to carry out the contract, such as the delivery of the abstract, the statement of the objections to or the acceptance of the title, or the preparation of the conveyance, shall be done within a reasonable time (*i*).

(2.) In the case of unreasonable delay by either party in the performance of any act necessary to carry out the contract, the other party may serve a notice on the party in default requiring him to do the act, which he delays to perform, within some specified time (which must be a reasonable space of time, having regard to the circumstances of the case, as from the date of the notice), and intimating the other party's intention

(*e*) *Cooper* v. *Emery*, 1 Ph. 388; Sug. V. & P. 446—450, 453, and n.; Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, ss. 3 (6), 9 (8, 11); see below, Chap. XII. § 3.

(*f*) See Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 9 (1, 9).

(*g*) V. & P. Act, 1874, stat. 37 & 38 Vict. c. 78, s. 2 (rule 4), as modified by Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 9 (8, 11).

(*h*) V. & P. Act, 1874, stat. 37 & 38 Vict. c. 78, s. 2 (rule 3), as modified by Conv. Act, 1881, stat. 44 & 45 Vict. c. 41, s. 9 (8, 11).

(*i*) Romilly, M. R., *Baker* v. *Metropolitan Ry. Co.*, 31 Beav. 504, 509, 510; Fry, J., *Green* v. *Sevin*, 13 Ch. D. 589, 599; *Howe* v. *Smith*, 27 Ch. D. 89, 103, 104; Romer, J., *Compton* v. *Bagley*, 1892, 1 Ch. 313, 321.

to put an end to the contract, if the notice be not complied with; and if such a notice be served and be not complied with, the party in default shall not enforce the specific performance of the contract in equity (*k*), and shall be liable at law for a breach of the contract (*l*).

Rights of property and possession pending completion.

8.—(1.) As from the date of the contract for sale the property shall in equity belong to the purchaser, with this exception, that the vendor shall until the proper time for completion take the rents, crops and other ordinary profits for his own use: but with this exception the vendor shall in equity have no other beneficial interest in the property than a lien for the price (*m*).

(2.) The vendor shall be entitled to an apportioned part of all rents accrued due at but not payable until after the proper time for completion (*n*).

(3.) Pending the completion of the purchase the vendor shall retain possession of the property sold, and shall manage and preserve it with the same care as a trustee is bound to use with regard to the property subject to his trust (*o*).

(4.) The vendor shall pay all rates, taxes and other outgoings payable in respect of or charged upon the property sold up to the proper time for completion.

(5.) Of such outgoings as are apportionable by law he shall only pay a due proportion up to the proper time for completion: but he shall discharge all outgoings not apportionable and becoming charged on the premises before such time, notwithstanding that they may not be payable until after such time (*p*).

(*k*) *Spurrier* v. *Hancock,* 4 Ves. 667; Langdale, M. R., *Taylor* v. *Brown,* 2 Beav. 180, 183; Romilly, M. R., *Parkin* v. *Thorold,* 16 Beav. 59, 71; *Pegg* v. *Wisden,* 16 Beav. 239, 244; Fry, J., *Crawford* v. *Toogood,* 13 Ch. D. 153, 158; *Green* v. *Sevin,* 13 Ch. D. 589, 599—601; *Stickney* v. *Keeble,* 1915, A. C. 386, 418.

(*l*) *Compton* v. *Bagley,* 1892, 1 Ch. 313; *Stickney* v. *Keeble,* 1915, A. C. 386.

(*m*) *Paine* v. *Meller,* 6 Ves. 349, 352; Plumer, M. R., *Wall* v. *Bright,* 1 J. & W. 494, 500; Kindersley, V.-C., *Dowson* v. *Solomon,* 1 Dr. & Sm. 1, 9, 10; Cairns, C., *Shaw* v. *Foster,* L. R. 5 H. L. 321, 338; Jessel, M. R., *Lysaght* v. *Edwards,* 2 Ch. D. 499, 505-8; *Re Cary Elwes' Contract,* 1906, 2 Ch. 143, 149; *Allen* v. *Inland Revenue Commrs.,* 1914, 1 K. B. 327, 334-337; 2 K. B. 327; Dart, V. & P. 247, 649, 5th ed.; 285, 733, 6th ed.; 289, 672, 7th ed.

(*n*) Apportionment Act, 1870, stat. 33 & 34 Vict. c. 35, s. 2.

(*o*) *Phillips* v. *Silvester,* L. R. 8 Ch. 173; *Egmont* v. *Smith,* 6 Ch. D. 469; *Royal Bristol, &c. Bdg. Soc.* v. *Bomash,* 35 Ch. D. 390; *Clarke* v. *Ramuz,* 1891, 2 Q. B. 456; *Golden Bread Co.* v. *Hemmings,* 1922, 1 Ch. 162, 172; see 2 Dart, V. & P. 649-651, 5th ed.; 733-735, 6th ed.; 673-675, 7th ed.

(*p*) *Carrodus* v. *Sharp,* 20 Beav. 56; *Midgley* v. *Coppock,* 4 Ex. D.

Interest payable if completion be delayed.

9.—(1.) If the purchase shall not be completed at the proper time (*q*), the purchaser shall pay interest at the rate of 4*l*. per cent. per annum (*r*) on the price agreed upon from that time until the completion of the purchase, and shall be entitled as from that time to the rents and other ordinary profits of the property (*s*): but the vendor shall retain possession or receipt of the rents and profits until the purchase shall actually be completed, when he shall account to the purchaser for all rents and profits accrued due since the proper time for completion (*t*).

(2.) If the vendor shall be in occupation of the property sold, he shall pay a fair occupation rent from the proper time for completion until the time of actual completion (*u*).

(3.) If the delay in completion shall be attributable to the vendor, and the purchaser shall appropriate his money to the purchase by depositing it in a bank or otherwise, and giving the vendor notice of such appropriation, the purchaser shall, as from the time of such appropriation, pay no more interest on the purchase-money, except such interest, if any, as he shall receive in respect of such deposit (*x*); but if the delay in completion shall be attributable to the purchaser, the purchaser shall not be exonerated from his liability to pay interest on the purchase-money by any such appropriation of his money to the purchase (*y*).

We have already briefly described the contracting parties' remedies by application to the Court (*z*). It remains to inquire

309; *Re Bettesworth and Richer*, 37 Ch. D. 535; *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74; *Barsht* v. *Tagg*, 1900, 1 Ch. 231; *Stock* v. *Meakin*, ib. 683; see *Egg* v. *Blayney*, 21 Q. B. D. 107.

(*q*) See above, p. 43.

(*r*) This is the rate usually allowed in equity; Sug. V. & P. 643; 2 Dart, V. & P. 627, 5th ed.; 708, 6th ed.; 650, 7th ed.; 1 Davidson, Prec. Conv. 575, 576, 4th ed.; 483, 5th ed.; *Re Davy*, 1908, 1 Ch. 61; *Re Cooke*, 1916, 1 Ch. 480, 491, 492.

(*s*) *Paine* v. *Meller*, 6 Ves. 349, 352; *Hardwicke* v. *Sandys*, 12 M. & W. 761; *Monro* v. *Taylor*, 8 Hare, 51, 70; 3 Mac. & G. 713; Sug. V. & P. 627.

(*t*) *M'Namara* v. *Williams*, 6 Ves. 143; see below, Chap. XI. § 1.

(*u*) *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, 18 Jur. 843; *Metropolitan Ry. Co.* v. *Defries*, 2 Q. B. D. 189, 387. See *Leggott* v. *Metropolitan Ry. Co.*, L. R. 5 Ch. 716.

(*x*) *Roberts* v. *Massey*, 13 Ves. 561; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575, 587; 1 Davidson, Prec. Conv. 573, 574, 4th ed.; 480, 481, 5th ed.

(*y*) Sug. V. & P. 628; 1 Dart, V. & P. 627, 628, 634-636, 5th ed.; 708, 709, 716-18, 6th ed.; 650, 651, 657-659, 7th ed.

(*z*) Above, pp. 35-38.

Has the vendor a right of re-sale without express stipulation?

whether, in the absence of express stipulation, a vendor of land has the right to re-sell, in case the purchaser make default in performing the contract. This appears exceedingly doubtful. It was incidentally held by Bacon, V.-C., in *Noble* v. *Edwardes* (*a*), that, if the purchaser unjustly repudiate the contract, as by refusing to accept a good title, the vendor may re-sell, after notice to the purchaser of his intention to do so, and sue the purchaser for the amount of any deficiency in price occurring on the re-sale. The V.-C.'s judgment was reversed for other reasons by the Court of Appeal, which made no pronouncement as to the correctness of his decision on the point in question. And his decision has been accepted by the editors of Dart's Vendors and Purchasers (*b*), and Davidson's Precedents in Conveyancing (*c*), as an authority for the proposition that the vendor of land has the right of re-sale, on breach of contract by the purchaser, without any express stipulation to that effect. But the correctness of this opinion seems questionable. The V.-C. held (*d*) that the common law gives to the vendor of land the same right of re-sale, in case of the purchaser's default, as it gives to a vendor of chattels. It is to be observed, however, that the assertion of a right *at common law* for the vendor of goods to re-sell them upon the buyer's default rests upon very slender authority (*e*). And the utmost extent of the common

(*a*) 5 Ch. D. 378, 388. It does not appear that the decision of this point was really necessary. The action was brought by a vendor, who had re-sold at a loss, to enforce his claim at common law for damages for breach of contract. All that the V.-C. decided was that the vendor was entitled to sue for the difference between the original contract price and the price on the re-sale: see 5 Ch. D. 392. But it seems that the vendor was clearly entitled to make this claim at law, even though the re-sale were wrongful: see *Stephens* v. *Wilkinson*, 2 B. & Ad. 320; *Page* v. *Cowasjee*, L. R. 1 P. C. 127; Benjamin on Sale, 648, 654, 2nd ed.

(*b*) P. 185, 6th ed., 179, 7th ed.

(*c*) P. 476, 5th ed.

(*d*) 5 Ch. D. 388.

(*e*) In Benjamin on Sale, 2nd ed. 1873, pp. 649, 655, it is laid down that the cases decide expressly that the vendor has no right to re-sell, for they determine that he is responsible for nominal damages for non-delivery of the goods where there is no difference between the contract and the market price thereof; and in support of this proposition *Valpy* v. *Oakeley*, 16 Q. B. 941, and *Griffiths* v. *Perry*, 1 E. & E. 680, are cited. But see the view now maintained by the editors of Benjamin on Sale, 934 *sq.*, 5th ed. In *Ex parte Stapleton, Re Nathan*, 1879, 10 Ch. D. 586, it was decided that an unpaid vendor of goods, who had re-sold (after notice of his intention to do so) upon the purchaser's bankruptcy, was entitled to prove for a deficiency in price on the re-sale. But it appears that he would have had this right

law authorities appears to be to allow to an unpaid vendor of goods a right of sale, after notice, on the buyer's default, to realize his lien for the price, similar to the right of sale, after due demand and notice, given to a pledgee of goods where a day is fixed for payment (*f*). But the lien, which a vendor of land has for the price pending completion, is a purely equitable charge (*g*), quite different from the common law right of a pledgee or an unpaid vendor of chattels. It does not appear to follow therefore that a vendor of land can enforce his equitable lien by sale, because an unpaid vendor of goods may, in certain circumstances, realize his common law lien by sale. And the proper remedy to enforce an unpaid vendor's lien on lands sold appears to be to apply to a Court of Equity for an order for sale (*h*). It is submitted, therefore, that the better opinion is still that expressed, before the case of *Noble* v. *Edwardes*, by the authors of Davidson's Precedents in Conveyancing (*i*); namely, that a re-sale to enforce the vendor's lien for the price in case of the purchaser's default, can only be lawfully made with the authority of a Court of Equity or Bankruptcy. It appears, however, that, as in the case of goods (*k*), a re-sale made on the purchaser's default by a vendor of lands, without any express power to re-sell, does not rescind the original contract; that, even if re-sale in such circumstances be unlawful, the vendor may sue the original purchaser or prove in his bankruptcy for any

even though the re-sale were wrongful; *Stephens* v. *Wilkinson*, 2 B. & Ad. 320; *Page* v. *Cowasjee*, L. R. 1 P. C. 127; Benj. Sale, 654, 2nd ed. Mr. M. D. Chalmers, however, in his Digest of the Law of Sale of Goods (1890), sect. 50 (3), evolved out of certain *obiter dicta* in *Page* v. *Cowasjee*, L. R. 1 P. C. 145; *Lord* v. *Price*, L. R. 9 Ex. 55, and *Ex parte Stapleton*, ubi sup., the rule afterwards adopted in the Sale of Goods Act, 1893, stat. 56 & 57 Vict. c. 71, s. 48 (3), viz., "Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract."

(*f*) See preceding note; and *Johnson* v. *Stear*, 15 C. B. N. S. 330; *Pigot* v. *Cubley*, ib. 701; Blackburn, J., *Donald* v. *Suckling*, L. R. 1 Q. B. 585, 616; Blackburn on Sale, 325, cited Benj. Sale, 644, 2nd ed.

(*g*) See Jessel, M. R., *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506, 507; above, p. 46.

(*h*) *Bowles* v. *Rogers*, 6 Ves. 95, n.; 3 Seton on Judgments, 2220-2225, 7th ed.; see below, Chaps. XI. § 1, XVIII. § 2, XIX. § 1.

(*i*) Vol. i., pp. 568-70, 4th ed.

(*k*) See Benj. Sale, 648, 654, 2nd ed.; *Maclean* v. *Dunn*, 4 Bing. 722; *Stephens* v. *Wilkinson*, 2 B. & Ad. 320; *Page* v. *Cowasjee*, L. R. 1 P. C. 127.

deficiency in price occurring on the re-sale (*l*); and that, if the re-sale result in an excess over the original price, the vendor must pay over the amount of such excess to the original purchaser (*m*). But if re-sale by a vendor of lands on the purchaser's default be unlawful without the authority of the Court, it is questionable whether the vendor would be entitled to recoup himself the expenses of re-sale out of the proceeds thereof (*n*). And it seems very doubtful whether a purchaser on a re-sale made without the authority of the Court would obtain a good title, if he had notice of the original contract for sale (*o*). In this respect the case of lands differs entirely from that of goods, in which the purchaser on a lawful re-sale now obtains a good title under an express enactment in the Sale of Goods Act, 1893 (*p*).

Re-sale as owner after a rescission for the purchaser's default—

If the vendor rescind the contract for the purchaser's breach of one of the main duties under the agreement (*q*), he is restored to his former beneficial ownership of the land, and can then *as owner* re-sell or otherwise dispose of it as he pleases (*r*). If he so re-sell for a higher price, such purchase-money is all his own: and if the re-sale produce less than the former contract-price, he must bear the loss himself (*s*). The vendor can also sell or otherwise dispose of the land *as owner* after judgment has been recovered by or against him in an action for damages for breach of one of the main duties arising under the contract (*t*).

or after judgment in an action for damages.

(*l*) *Ex parte Seaforth*, 19 Ves. 235; *Hope* v. *Booth*, 1 B. & Ad. 498; *Gray* v. *Gray*, 1 Beav. 199; *Harding* v. *Harding*, 4 My. & Cr. 514.

(*m*) *Greaves* v. *Ashlin*, 3 Camp. 426; *Valpy* v. *Oakeley*, 16 Q. B. 941; *Griffiths* v. *Perry*, 1 E. & E. 680. The contrary appears to be laid down in 1 Davidson, Prec. Conv. 570, 4th ed., and 1 Dart, V. & P. 185, 6th ed.; 179, 180, 7th ed.; but *Ex parte Hunter*, 6 Ves. 94, 97, cited as the authority for these statements, was a case of re-sale under an express power of re-sale, whereby the original contract is rescinded; *Lamond* v. *Davall*, 9 Q. B. 1030; Sug. V. & P. 39. And it appears from 1 Dart, V. & P. 163, 5th ed., that Mr. Dart's statement was made with respect to such a sale. It seems too that Mr. Davidson's statement was really intended to apply only to such a sale.

(*n*) 1 Davidson, Prec. Conv. 570, 4th ed. Note that Bacon, V.-C., decided nothing in *Noble* v. *Edwardes*, 5 Ch. D. 378, 392, as to the vendor's right to recover the expenses of re-sale.

(*o*) He might, of course, obtain a good title as a *bonâ fide* purchaser *without* notice of the original sale.

(*p*) Stat. 56 & 57 Vict. c. 71, s. 48 (2).

(*q*) Above, p. 34.

(*r*) *Howe* v. *Smith*, 27 Ch. D. 89, 104, 105; Eve, J., *Hall* v. *Burnell*, 1911, 2 Ch. 551, 555.

(*s*) See below, Chap. XIX. § 1.

(*t*) See above, p. 35; below, Chap. XIX. § 2.

CHAPTER III.

OF THE USUAL CONDITIONS OF SALE.

Having thus given an outline of the main duties imposed upon the parties to the contract and their remedies for its breach, and attempted to state the terms of an open contract, we will now endeavour to complete our general view of the effect of a sale of land by pointing out in what particulars the rights and obligations of the parties are usually expressed or modified, in formal contracts by special stipulation. We will first examine the conditions generally made on sales by auction.

Importance usually made in formal contracts.

1. As we have seen, in a sale of land by auction the particulars or conditions must state whether the land will be sold without reserve or subject to a reserved price, or whether a right to bid is reserved; and if the sale be announced to be without reserve, it will not be lawful for the vendor to bid, either in person or by agent (*a*). It is therefore the practice expressly to reserve to the vendor the right to bid as often as he may please (*b*), and it is usually stipulated that the vendor and his agents may bid as often as he or they may please (*c*), notwithstanding the doubt judicially expressed as before mentioned (*d*) whether it be lawful for a vendor of land to employ more than one puffer at an auction. Where there is to be a reserve price, this should be stated in the conditions, and the right for the vendor or his agents to bid should be reserved as well. It is usually stipulated that, subject to the rights so reserved, the highest bidder shall be the purchaser (*e*). The lowest amount by which the biddings shall advance is generally specified, or else it is provided that no amount of the advance of each bidding shall be regu-

Reserving the right to bid at an auction.

(*a*) Stat. 30 & 31 Vict. c. 48, s. 5; above, p. 23.
(*b*) Above, p. 24.
(*c*) 1 Davidson, Prec. Conv. 667, 4th ed., 512, 513, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 258, 4th ed.; 263, 10th ed.
(*d*) Above, p. 24.
(*e*) See above, p. 25.

lated by the auctioneer; and the condition is also made that no bidding shall be retracted, the latter stipulation being inserted for whatever it may be worth, notwithstanding that it is thought to be unenforceable. And it is declared that, if any dispute shall arise concerning a bidding, the property shall be put up again and resold (*f*).

Deposit:

2. We have seen that no deposit of any part of the purchase-money can lawfully be demanded after an open contract for sale has been concluded; as the whole price is not payable until the time for completion (*g*). But on sales of land by auction it is always provided that a deposit of a certain proportion (as ten per cent.) of the purchase-money shall be paid by the purchaser immediately on signing the contract (*h*). It is also invariably stipulated that the purchaser shall sign a memorandum of the contract immediately after the sale. This stipulation is absolutely necessary on account of the Statute of Frauds (*i*): but it does not appear that it can be enforced (*k*).

signing a memorandum.

Time for completion.

3. A day is always fixed for the completion of the contract. In such cases it was said that at law time was of the essence of the contract; that is to say, the Courts of Common Law (not unreasonably) held the parties to mean what they said (*l*), and therefore considered that a stipulation to complete the purchase on a given day bound the vendor to have shown and verified a good title and to be ready to convey on that day; in default of which the purchaser was entitled either to rescind the contract and to recover his expenses incurred thereunder (such as his deposit and his costs of investigating the title), or to sue in affirmance of the contract for damages for breach of the agreement (*m*). In equity, however, it was well established that neither party to a contract for sale of land should lose his right

(*f*) See above, p. 20; 1 Davidson, Prec. Conv. 519, 607, 4th ed.; 432, 525, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 257, 258, 4th ed.; 268, 10th ed.

(*g*) Above, pp. 27, 43.

(*h*) 1 Davidson, Prec. Conv. 607, 4th ed.; 519, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 258, 4th ed.; 268, 10th ed.

(*i*) Above, pp. 3, 20-22.

(*k*) See above, pp. 20-22.

(*l*) *Marshall* v. *Powell*, 9 Q. B. 779.

(*m*) See above, p. 35; *Berry* v. *Young*, 2 Esp. 640, n.; *Wilde* v. *Fort*, 4 Taunt. 334; *Hanslip* v. *Padwick*, 5 Ex. 615; Sug. V. & P. 257-9; Dart, V. & P. 417, 944, 945, 949, 5th ed.; 482, 1071, 1072, 1076, 6th ed.; 495, 984, 985, 990, 7th ed.

Rule of equity as to time not being of the essence of the contract—

to specific performance merely through failure to comply with some stipulation as to time, if time were not of the essence of the contract. That is to say, the Courts of Equity, in administering their own peculiar remedies, held that they were not concluded by the letter of an agreement to do some act within a given time, but would look to what they called "the substance of the contract," and ascertain whether a stipulation as to time were intended to be material or merely formal. And they granted specific relief, if there were no unreasonable delay, notwithstanding the want of exact compliance with a formal stipulation as to time, upon a principle analogous to that on which they decreed the redemption of mortgages after the day fixed for redemption was past (*n*). The nature of this jurisdiction is thus described by Lord Cairns (*o*):—"A Court of Equity will relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry* (*p*)) there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds against interference mentioned by Lord Justice Turner, 'express stipulations' requires no comment. The 'nature of

(*n*) *Pincke* v. *Curteis*, 4 Bro. C. C. 329; Redesdale, Ir. C., *Lennon* v. *Napper*, 2 Sch. & Lef. 684; Eldon, C., *Seton* v. *Slade*, 7 Ves. 265, 273-5; *Radcliffe* v. *Warrington*, 12 Ves. 326; *Hearne* v. *Tenant*, 13 Ves. 287; *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401; *Parkin* v. *Thorold*, 16 Beav. 59; *Roberts* v. *Berry*, 3 De G., M. & G. 284; *Stickney* v. *Keeble*, 1915, A. C. 386, 401-404, 415-417; Fry, Sp. Perf. § 1072, p. 489. In recent times, equity judges seem to have thought it necessary to allege that, notwithstanding the exercise of this jurisdiction, the contract is construed in the same manner in equity as at law; Romilly, M. R., *Parkin* v. *Thorold*, 16 Beav. 66; Knight Bruce, L.J., *Roberts* v. *Berry*, 3 De G., M. & G. 290; Cairns, C., *Tilley* v. *Thomas*, L. R. 3 Ch. 67. But there can be no doubt that the Courts of Equity, in assuming a jurisdiction to enforce contracts which were broken at law by failure to observe a stipulation as to time, have practically interfered with the legal effect of the contract; and when one considers all the delays that have been condoned in equity on the ground that time is not of the essence of a contract to sell land, it appears very questionable whether this doctrine has really conferred any benefit upon the community.

(*o*) In *Tilley* v. *Thomas*, L. R. 3 Ch. 61, 67.

(*p*) 3 De G., M. & G. 284, 291.

the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case" (*q*). Under the Judicature Act, 1873 (*r*), stipulations in contracts, as to time or otherwise, which would not before the commencement of the Act have been deemed to be or to become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have theretofore received in equity. On an ordinary sale of land, it is not usual, in fixing the date of completion, expressly to make time of the essence of the contract. If, however, such a stipulation be made, it will be construed strictly, and the Courts will give no relief against a failure, arising from accident, to comply with it (*s*).

Now applied at law.

Effect of fixing a day for completion without further stipulation.

When a day is fixed for the completion of the contract, without further special stipulation, the purchaser becomes entitled to the rents and profits and liable to discharge the outgoings as from that day, the vendor taking the profits and discharging the outgoings up to that day (*t*). And if the purchase be not completed on that day, and the delay be attributable to the purchaser, he is bound to pay interest on the purchase-money as from that day, whether he have entered into possession or not. But if the delay be attributable to the vendor, the purchaser is chargeable with interest (and consequently entitled to the profits and liable to the outgoings) only from the time when he either actually took or might safely have taken possession, the latter time being when a good title has been shown and verified (*u*). The purchaser may, however, discharge himself from the liability to pay interest, where the delay is attributable to the vendor's and not his own fault, by appropriating his money to the purchase in manner before explained (*x*). But, as we shall see, these matters and especially the payment of

(*q*) See below, Chap. XII. § 1; Fry, Sp. Perf. §§ 1075-1091, pp. 491-8.

(*r*) Stat. 36 & 37 Vict. c. 66, s. 25 (7), amended by 38 & 39 Vict. c. 77, s. 10, as to the effect of which see Fry, L. J., *Howe* v. *Smith*, 27 Ch. D. 89, 103; *Stickney* v. *Keeble*, 1915, A. C. 386, 401-404, 415-417.

(*s*) *Brickles* v. *Snell*, 1916, A. C. 599, 603, 604.

(*t*) Sug. V. & P. 627; above, p. 46.

(*u*) *Pincke* v. *Curteis*, 4 Bro. C. C. 329, 333, n.; Leach, V.-C., *Esdaile* v. *Stephenson*, 1 S. & S. 122, 123; *Jones* v. *Mudd*, 4 Russ. 118; Sug. V. & P. 627 *sq.*; 2 Dart, V. & P. 627, 628, 5th ed.; 708, 709, 6th ed.; 650, 651, 7th ed.

(*x*) Above, p. 47.

interest are usually provided for by special stipulation in formal contracts.

Fixtures or timber to be taken at a valuation.

4. If it be intended that the fixtures or timber (*y*) or other trees upon the property sold shall be paid for at a valuation in addition to the sum agreed on as the price of the land, a special stipulation to that effect must form part of the contract of sale: otherwise the purchaser will be entitled to have the fixtures and trees, as passing with the land, without extra payment (*z*). Such a stipulation is very commonly made, and the mode of valuation is usually specified; for instance, by two valuers to be appointed one by either party, or an umpire to be appointed by the valuers. But an agreement to sell property at a price to be ascertained by valuation made in a particular way does not result in an enforceable contract if that way be not pursued; for if the parties agree that the price is to be fixed by A., and A. do not fix it, the price is not reduced to the required certainty (*a*); and the Court will not, as a rule, provide other means of fixing the price, for that would be holding the parties bound by a contract different from that which they made (*b*). It is therefore proper to stipulate, after providing that fixtures or timber shall be taken at a valuation to be made in a particular manner, that failing such valuation they shall be paid for at a fair valuation or at their fair value. In such case, the Court will, it seems, direct a reference, if necessary, to ascertain the price (*c*).

What trees are timber.

(*y*) Timber trees are oak, ash and elm in all places; and in some particular parts of the country, by local custom, where other trees are generally used for building, they are for that reason considered as timber; Co. Litt. 53a and n. (10); 2 Black. Comm. 281; *Aubrey* v. *Fisher*, 10 East, 446; *Dashwood* v. *Magniac*, 1891, 3 Ch. 306.

(*z*) *Colegrave* v. *Dias Santos*, 2 B. & C. 76.

(*a*) See above, p. 4.

(*b*) *Milnes* v. *Gery*, 14 Ves. 400; *Blundell* v. *Brettargh*, 17 Ves. 232; *Collins* v. *Collins*, 26 Beav. 306; *Vickers* v. *Vickers*, L. R. 4 Eq. 529; Fry, Sp. Perf. §§ 354-367, pp. 161-7.

(*c*) See above, p. 4, n. (*m*); Sug. V. & P. 287, 288; 1 Dart, V. & P. 221-3, 5th ed.; 257-9, 6th ed.; 242-4, 7th ed.; 1 Davidson, Prec. Conv. 522, 523, 607, 608, 4th ed.; 435, 513, 519, 5th ed. The Home Grown Timber Prices Order, 1918, prohibited the sale or purchase, or the offering for sale or purchase, of any timber grown in the United Kingdom at prices exceeding, for standing timber, those set forth in Schedule A. thereto. This Order was made on the 26th March, 1918, by the Board of Trade under the Defence of the Realm Regulations authorized by the Defence of the Realm Consolidation Act, 1914, and the Acts amending it (stats. 5 Geo. V. cc. 8, 34, 37, 42). The Order is stated in 62 Sol. J. 442, and Schedule A. is set out in Appendix (E), below. The expression "timber" in this Order obviously includes all trees specified in that Schedule; cf. above, n. (*y*). This Order

Maximum prices fixed during the war on the sale of standing timber.

Commencement of title.

5. It is usual to specify the instrument of disposition with which the title shall commence, especially if it be intended to confine the time, for which title is to be shown, within a shorter limit than the period fixed by law (*d*). No such stipulation is necessary if the vendor propose to deliver an abstract commencing with a good root of title (*e*) and extending over the whole period, for which title can by law be required to be shown. But if it be desired effectually to limit the purchaser's rights, as defined by law, in the matter either of the time for which he may require title to be shown or of the nature of the instrument with which the title is to commence, a fair and explicit stipulation to the effect desired must be made (*f*).

Limiting time for making requisitions on title.

6. It is usual to provide that the purchaser's requisitions on or objections to the title, or anything else connected with the sale, shall be sent to the vendor's solicitors within a limited time (as twenty-one days) after the delivery of the abstract of title, that in this respect time shall be of the essence of the contract (*g*), and that in default of or subject only to any such requisitions and objections so made the purchaser shall be taken to have accepted the title (*h*). And it is sometimes stipulated that any replies to the vendor's answers to the requisitions must be made within a specified time (*i*). Where such stipulations are made,

was revoked, as from the 31st March, 1919, by Order of the Board of Trade dated 5th March, 1919; see 63 Sol. J. 356. The effect of this Order appears to be that, on any sale made during the continuance of the Order of standing timber, along with the land, on which it is growing, and at a price to be fixed by valuation in addition to the price agreed to be paid for the land, the price so fixed for the timber should not exceed the maximum prices allowed by the Order. The effect of a conveyance on a sale made in contravention of this Order is discussed in Appendix (E), below.

Timber Control Order, 1918.

The Timber Control Order, 1918, made on the 16th July, 1918, by the Board of Trade under the Defence of the Realm Regulations (62 Sol. J. 705, 706) required a permit or permits to be obtained from the Controller of Timber Supplies on any sale made during the continuance of the Order of land with timber growing thereon, of which the contents (excluding hedgerow trees) exceeded ten thousand cubic feet. But the provisions of this Order in this behalf were revoked by an amending Order of the 5th December, 1918 (63 Sol. J. 138). These provisions are stated and their effect discussed in Appendix (E), below.

(*d*) See above, p. 32. (*e*) Above, p. 39.

(*f*) See *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*g*) See above, p. 53.

(*h*) 1 Davidson, Prec. Conv. 539, 614, 4th ed.; 449, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 265, 4th ed.; 281, 10th ed.

(*i*) 1 Davidson, Prec. Conv. 521-2, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 265, 4th ed.; 281, 10th ed. For a form of such a stipulation, see Appendix (A), General Condition 3, below.

it is not desirable, in the vendor's interest, to provide that the abstract shall be delivered within a specified time; as if he should fail to deliver it within the period appointed, the condition limiting the time, within which the purchaser is to make his requisitions, will fail of effect (*k*). It is further held with regard to such stipulations that the time thereby limited only begins to run from the delivery of a perfect abstract, that is, as perfect an abstract as the vendor is able to furnish at the time of delivery, although it may not show a complete title (*l*). Hence it is sometimes provided in conditions of sale that, for the purpose of any requisition or objection, the abstract shall be deemed perfect, if it supply the information suggesting the same, although otherwise defective. Such a stipulation is sanctioned by the practice of eminent conveyancers: but it has never been decided how far it is efficacious; and as regards the enforcement of specific performance its operation would appear to be very limited (*m*). The stipulation, that in default of requisitions or objections made within the time limited, the purchaser shall be taken to have accepted the title, does not bind him to take the property sold, if on the face of the abstract the vendor show no title at all to convey the same, even though this objection were not taken within the time appointed (*n*).

As we have seen (*o*), in the absence of any stipulation as to time, the vendor is bound to deliver the abstract within a reasonable time after the contract, and the purchaser is bound to make his objections, if any, to the title within a reasonable time after the delivery of the abstract; and if the latter make undue delay in examining or accepting the title, he may lose his right to enforce the specific performance of the contract (*p*). And retainer of the abstract for a long time, without making

(*k*) *Upperton* v. *Nickolson*, L. R. 6 Ch. 436; 1 Dart, V. & P. 125, 5th ed.; 141, 6th ed.; 137, 138, 7th ed.

(*l*) *Hobson* v. *Bell*, 2 Beav. 17; *Morley* v. *Cook*, 2 Hare, 111; *Blackburn* v. *Smith*, 2 Ex. 789; *Gray* v. *Fowler*, L. R. 8 Ex. 249, 279; Sug. V. & P. 21; 1 Dart, V. & P. 126, 161, 162, 281, 5th ed.; 142, 184, 321, 6th ed.; 138, 174, 317, 7th ed.

(*m*) See 1 Dart, V. & P. 126, 5th ed.; 142, 6th ed.; 138, 7th ed.; 1 Davidson, Prec. Conv. 540, 4th ed.; 450, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 265, 4th ed.; 281, 10th ed.; above, p. 37; and for a form of such a stipulation, Appendix (A), General Condition 3, below.

(*n*) *Want* v. *Stallibrass*, L. R. 8 Ex. 175; *Re Tanqueray Willaume and Landau*, 20 Ch. D. 465, 473, 474; see below, Chap. V.

(*o*) Above, p. 45.

(*p*) *Spurrier* v. *Hancock*, 4 Ves. 667; Fry, Sp. Perf. § 1103, p. 515, 6th ed.

any requisitions, may amount to an acceptance of the title (*q*). In case of unreasonable delay on the purchaser's part, the vendor may send him a notice requiring him to accept or reject the title within a definite period (which must be a *reasonable* space of time as from the date of the notice), on pain of the vendor's putting an end to the contract; and if the purchaser fail to comply with such a notice, he will lose his right to enforce specific performance of the contract, and the vendor will be at liberty to rescind the contract or to sue upon it as broken (*r*).

Purchaser should ask for abstract.

What is a reasonable time is a question of fact to be determined with regard to the circumstances of each particular case. If the vendor delay in sending the abstract of title, the purchaser should ask for it; if he fail to do this, he will be considered to have waived the delay, and will be precluded from asserting the non-delivery of the abstract within the appointed time or a reasonable time, as the case may be, to be a breach of contract by the vendor (*s*).

Reservation to vendor of right to rescind the contract.

7. The vendor generally reserves the right to rescind the contract if the purchaser shall insist on any requisition or objection which he shall be unable or unwilling to remove or comply with (*t*). In the absence of such a stipulation, neither party is at liberty to recede from the agreement without the consent of the other; this is of the very essence of contract (*u*). A right so reserved to rescind the contract must be exercised reasonably and in good faith, and not arbitrarily or capriciously (*x*): but if this limitation be observed, the present

(*q*) Romilly, M. R., *Pegg* v. *Wisden*, 16 Beav. 239, 244, 245; Fry, Sp. Perf. § 1351, p. 621, 6th ed.

(*r*) *Taylor* v. *Brown*, 2 Beav. 180, 183; *Walker* v. *Jeffreys*, 1 Hare, 341, 348; Sug. V. & P. 268, 269; Fry, Sp. Perf. §§ 1092 *sq.*, pp. 510 *sq.*, 6th ed.; *Compton* v. *Bagley*, 1892, 1 Ch. 313; *Stickney* v. *Keeble*, 1915, A. C. 386; above, pp. 35, 45, 46.

(*s*) Sug. V. & P. 260, 261; 1 Dart, V. & P. 304, 305, 5th ed.; 346, 347, 6th ed.; 341, 342, 7th ed.

(*t*) This has long been usual; *Falkner* v. *Equitable Reversionary Co.*, 4 Drew. 352; Juridical Socy. Papers, ii. 590; 1 Davidson, Prec. Conv. 564, 4th ed.

(*u*) Above, p. 17; Cozens-Hardy, M. R., *Re Taylor*, 1910, 1 K. B. 562, 571, 572.

(*x*) *Re Dames and Wood*, 29 Ch. D. 626; *Re Glenton and Saunders* to *Haden*, 53 L. T. N. S. 434; *Re Terry and White's Contract*, 32 Ch. D. 14; *Re Starr Bowkett Bdg. Socy. and Sibun's Contract*, 42 Ch. D. 375; *Re Deighton and Harris's Contract*, 1898, 1 Ch. 458; *Quinion* v. *Horne*, 1906, 1 Ch. 596; see *Greaves* v. *Wilson*, 25 Beav. 290 (with which cf. *Re Great Northern Railway Co. and Sanderson*, 25 Ch. D. 788, 794); *Bowman* v. *Hyland*, 8 Ch. D. 588; *Smith* v.

tendency of the Courts is not otherwise to interfere with the effect of such a condition by enforcing specific performance against a vendor who has availed himself of the letter of a stipulation entitling him to rescind (*y*). The condition is now very frequently framed in such a way as to give the purchaser the opportunity of withdrawing the requisition, with which the vendor cannot or will not comply (*z*); and this certainly appears to be the fair and proper course to take.

Evidence of identity.

8. The purchaser's right to require evidence of the identity of the property sold with that described in the title-deeds (*a*) is usually limited by a stipulation, which precludes him from calling for other evidence of identity than is afforded by comparing the descriptions in the title-deeds with that contained in the contract (*b*). But this stipulation, in its common form, does not enable the vendor to enforce specific performance, without further evidence of identity, if such comparison afford no evidence that the property sold corresponds with that or part of that described in the deeds (*c*). When that is the case, or the evidence so afforded is defective, a more stringent stipulation is usually resorted to (*d*).

Wallace, 1895, 1 Ch. 385; *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412; *Holliwell* v. *Seacombe*, ib. 426; below, Chaps. V., XII. § 4.

(*y*) See *Duddell* v. *Simpson*, L. R. 2 Ch. 102; *Mawson* v. *Fletcher*, L. R. 10 Eq. 212, 6 Ch. 91, where the terms of the condition were exceptionally wide; *Re Great Northern Railway Co. and Sanderson*, 25 Ch. D. 788; *Heppenstall* v. *Hose*, 1884, W. N. 199, 51 L. T. 589, 33 W. R. 30; *Re Terry and White's Contract*, 32 Ch. D. 14; *Ashburner* v. *Sewell*, 1891, 3 Ch. 405; *Re Ramuz and Edwards' Contract*, 37 Sol. J. 701; *Re Deighton and Harris' Contract*, 1898, 1 Ch. 458; and the distinction propounded in *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412, 420—422; *Re Milner and Organ's Contract*, 64 Sol. J. 463; *Merrett* v. *Schuster*, 1920, 2 Ch. 240; all showing that a vendor who has by an innocent error contracted to sell more (either in quantity, title or estate) than he is entitled to convey, may rescind under a condition of this kind. But a vendor who has knowingly or recklessly (though without any intention to defraud) made a misrepresentation as to what he contracts to sell cannot avail himself of such a condition; *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412; *Holliwell* v. *Seacombe*, ib. 426. It is respectfully submitted that the case of *Procter* v. *Pugh*, 1921, 2 Ch. 256, was wrongly decided; see the author's criticism of the decision and judgment in that case in 66 Sol. J. 119, 135. And see below, Chaps. V., XII. § 4.

(*z*) 1 Key & Elphinstone, Prec. Conv. 266, 4th ed.; 282, 10th ed.

(*a*) Above, pp. 33, 40.

(*b*) 1 Davidson, Prec. Conv. 610, and n., 4th ed.; 520, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 262, 5th ed.; 275, 10th ed.

(*c*) *Flower* v. *Hartopp*, 6 Beav. 476; *Curling* v. *Austin*, 2 Dr. & Sm. 129; and see Sug. V. & P. 26; 1 Dart, V. & P. 153, 154, 5th ed.; 174, 175, 6th ed.; 170, 7th ed.

(*d*) See Appendix (A), General Condition 5, below.

Errors of description; compensation.

9. It is usually provided that errors of description shall not annul the sale, and either that no compensation or that reasonable compensation shall be allowed therefor (*e*). The better opinion is that an agreement allowing no compensation for errors of description applies to all errors, both great and small, so as to preclude the purchaser from requiring (as otherwise he might require (*f*)) specific performance of the contract with compensation: but it is held that the *vendor* is not thereby enabled to force upon the purchaser a property which has been substantially misdescribed (*g*). An express contract to make compensation for errors of description does not appear to add or subtract anything to or from the purchaser's ordinary right to enforce specific performance of the contract with compensation (*h*): but it gives him the right, which he would not otherwise possess (*i*), to recover compensation for an error innocently made by the vendor but not discovered until after the completion of the contract (*k*). The vendor cannot, by reason of a condition to allow compensation, oblige the purchaser to take a property substantially different from that sold (*l*); but such a condition may cover a considerable deficiency in quantity even when the vendor is seeking to enforce the contract, if the Court be satisfied that, substantially, the purchaser will get the sort of property he contracted to buy (*m*). It is considered that a condition precluding any right to compensation is, on the whole, more advantageous to the vendor (*n*). Where a condition for giving compensation is made on a sale by auction, it is usual to pro-

(*e*) 1 Davidson, Prec. Conv. 559, 4th ed.; 464, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 267, 268, 4th ed.; 283, 286, 10th ed.

(*f*) See above, pp. 41, 42.

(*g*) *Nicoll* v. *Chambers*, 11 C. B. 996; *Cordingley* v. *Cheeseborough*, 4 De G., F. & J. 379; *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; *Re Terry and White's Contract*, 32 Ch. D. 14; Dart, V. & P. 740, 6th ed.; 680, 7th ed.; *Jacobs* v. *Revell*, 1900, 2 Ch. 858; Parker, J., *Shepherd* v. *Croft*, 1911, 1 Ch. 521, 528, 529; *Lee* v. *Rayson*, 1917, 1 Ch. 613; see below, Chap. XII. § 4.

(*h*) Dart, V. & P. 741, 6th ed.; 681, 7th ed.; above, pp. 41, 42; see below, Chap. XII. § 4.

(*i*) *Joliffe* v. *Baker*, 11 Q. B. D. 255. In some circumstances, however, the purchaser may have a remedy by suing on the vendor's covenants for title; see *Eastwood* v. *Ashton*, 1915, A. C. 900. But he will not necessarily have this remedy in every such case; see below, Chap. XIX. § 5.

(*k*) *Palmer* v. *Johnson*, 13 Q. B. D. 351.

(*l*) *Flight* v. *Booth*, 1 Bing. N. C. 370; 4 L. J. N. S. C. P. 66; see below, Chap. XII. § 4.

(*m*) *Re Fawcett and Holmes*, 42 Ch. D. 150.

(*n*) 1 Davidson, Prec. Conv. 468, 5th ed.

vide that compensation shall be allowed on either side, so that the vendor may take advantage of it as well as the purchaser (*o*); and it is desirable to stipulate that it shall apply only to errors of description pointed out before completion (*p*).

Conveyance.

10. The execution of the conveyance by the vendor and the payment of the balance of the price by the purchaser on the day fixed for completion are usually the subjects of express provision; and it is generally stipulated that the purchaser shall bear the expense of any assurance or act necessary for getting in or releasing any outstanding estate or interest or perfecting the vendor's title (*q*); and it is sometimes declared that the purchaser shall bear the expense of the concurrence in the conveyance of all necessary parties other than the vendor (*r*).

Apportionment of rents and outgoings.

11. It is usual to provide expressly that the vendor shall be entitled to possession or receipt of the rents and profits and liable to discharge the outgoings up to the day fixed for completion, and the purchaser afterwards; and that the rents and outgoings shall, if necessary, be apportioned for this purpose (*s*).

Interest in case of delay in completion.

12. It is usually stipulated that the purchaser shall pay interest at a specified rate on his unpaid purchase-money, if from any cause whatever the purchase be not completed on the day fixed for completion (*t*). If the purchaser bind himself to pay interest by an express stipulation in terms like these, he must pay interest in case of delay in completion, notwithstanding that the delay be attributable to the state of the title or otherwise to the vendor; and he will not be relieved from this obligation unless the delay be caused by the vendor's vexatious conduct, dealing in bad faith or gross negligence (*u*). Nor can he,

(*o*) See *Leslie* v. *Tompson*, 9 Hare, 268; below, Chap. XII. § 4.

(*p*) 1 Davidson, Prec. Conv. 562, 611, n. (*t*), 4th ed.; 467, 520, n. (*i*), 5th ed.; 1 Key & Elph. Prec. Conv. 267, 268, 4th ed.; 285, 286, 10th ed.

(*q*) See above, p. 44; 1 Davidson, Prec. Conv. 570, 612, and n., 4th ed.; 1 Key & Elphinstone, Prec. Conv. 263, 4th ed.; 276, 277, 10th ed.

(*r*) See above, p. 44.

(*s*) See above, p. 46; 1 Davidson, Prec. Conv. 613, 4th ed.; 1 Key & Elphinstone, Prec. Conv. 259, 4th ed.; 269, 270, 10th ed.

(*t*) See above, p. 47; 1 Davidson, Prec. Conv. 576, 613, 4th ed.; 483, 522, 5th ed.

(*u*) *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517, 529; *Bannerman* v. *Clarke*, 3 Drew. 632; *Vickers* v. *Hand*, 26 Beav. 630; *Williams* v.

according to the better opinion, discharge himself from his liability to pay interest by appropriating his money to the purchase (*x*). Sometimes the contract is so worded as to bind the purchaser to pay interest in case of delay in completion arising from any cause whatever *other than the wilful default of the vendor;* and in such case the purchaser must pay interest unless the vendor were in wilful default, and such default were the effective cause of the delay (*y*). In this form the stipulation has been fruitful of litigation, with the result that little else has been clearly established than the futility pointed out by Lord Bowen of attempting a precise definition of the meaning of "wilful default" in such contracts (*z*), and the question, what conduct amounts to wilful default, can only be solved by consideration of the circumstances of each particular case (*a*).

Right to re-sell.

13. In conditions of sale by auction the vendor usually reserves the right to re-sell the property, if the purchaser fail

Glenton, L. R. 1 Ch. 200; *Re Kissock and Taylor,* 1916, 1 I. R. 393; Sug. V. & P. 633-7; Dart, V. & P. 128, 635, 639, 5th ed.; 144, 719, 723, 6th ed.; 140, 661, 664, 7th ed.; and see *Re Bayley-Worthington & Cohen's Contract,* 1909, 1 Ch. 648, 654.

(*x*) *Re Riley* to *Streatfield,* 34 Ch. D. 386.

(*y*) See *Re Mayor of London and Tubbs' Contract* and *Bennett* v. *Stone,* cited below.

(*z*) Default is said to mean not doing what is reasonable in the circumstances; wilful to imply nothing blameable, but merely the result of the spontaneous action of the will; Bowen, L. J., 31 Ch. D. 174, 175; "moral delinquency, intentional delay, wilful obstruction on the part of a vendor may be all absent, and yet there may be wilful default"; C. A. 1893, 3 Ch. 281.

(*a*) See *Re Young and Harston's Contract,* 31 Ch. D. 168, where it was held wilful default for the vendor to go abroad two days before the day fixed for completion; *Re Hetling and Merton's Contract,* 1893, 3 Ch. 269, where a mortgagee was abroad and the vendor relied on a power of attorney from him, which was held insufficient—this was considered wilful default; *Re Mayor of London and Tubbs' Contract,* 1894, 2 Ch. 524, where the vendors, having omitted to examine their title, misdescribed it in the contract—this was considered by Lindley and Lopes, L. JJ., not to be wilful default, *diss.* Kay, L. J.; *Re Wilsons and Stevens' Contract,* 1894, 3 Ch. 546, where it was held wilful default for a vendor of copyholds not to have procured certain admissions necessary to enable him to convey the legal estate; *Re Strafford and Maples,* 1896, 1 Ch. 235, where Kekewich, J., held it wilful default for a vendor not to have procured the concurrence of necessary parties to the conveyance; *Re Woods and Lewis's Contract,* 1898, 1 Ch. 433, 2 Ch. 211; *North* v. *Percival,* 1898, 2 Ch. 128; *Bennett* v. *Stone,* 1902, 1 Ch. 226; 1903, 1 Ch. 509, where four judges were exactly divided in opinion whether it was wilful default for a vendor to insist in good faith upon an unreasonable contention as to the form of the conveyance; *Re Kissock and Taylor,* 1916, 1 I. R. 393.

to comply with the conditions, and to recover from the purchaser any deficiency in price occurring on the re-sale (*b*). A re-sale under such a condition operates as a rescission of the original contract. The vendor is therefore entitled to retain for his own benefit any excess over the original contract price which may be realised on the re-sale (*c*).

Stipulations left to be implied on sales by auction.

It is not the practice, in settling conditions of sale, to stipulate expressly that the vendor shall show a good title, or verify the title by the production of the proper evidence, or produce a property identical with that agreed to be sold, or deliver over the title deeds on completion, or that the purchaser shall accept the title when proved (*d*). All these terms of the contract (*e*) are left to be implied therein by law. And it is also the present practice to leave to implication those provisions which are incorporated in contracts for the sale of land, in the absence of an expressed intention to the contrary, by the Vendor and Purchaser Act, 1874 (*f*), and the Conveyancing Act, 1881 (*g*), unless it be desired to make more stringent or other stipulations than those so implied by statute. Thus, in respect of making recitals in instruments twenty years old *primâ facie* evidence (*h*), barring the production of and inquiries as to the title earlier than the date fixed for commencement of the title (*i*), providing for the expense of the production of title deeds not in the vendor's possession, and of the procurement and production of any evidence of title not in the vendor's possession (*k*), and stipulating for the retention by the vendor of title deeds relating to other land of his, and for his giving a statutory acknowledgment and undertaking for the production and safe custody thereof (*l*), the respective rights and duties of the parties are very often not expressly defined in conditions of sale, but left to be regulated by statute (*m*).

(*b*) See 1 Davidson, Prec. Conv. 568, 4th ed.; 475, 5th ed.; 1 Key & Elph. Prec. Conv. 268, 4th ed.; 286, 10th ed.
(*c*) *Ex parte Hunter*, 6 Ves. 94; *Lamond* v. *Davall*, 9 Q. B. 1030; Sug. V. & P. 39; above, p. 50, n. (*m*); see below, Chap. XIX. § 1.
(*d*) See 1 Davidson, Prec. Conv. 607 *sq.*, 4th ed.; 518 *sq.*, 5th ed.; 1 Key & Elph. Prec. Conv. 257 *sq.*, 4th ed.; 268 *sq.*, 10th ed.
(*e*) Above, pp. 31-34, 39-45.
(*f*) Stat. 37 & 38 Vict. c. 78, ss. 1, 2.
(*g*) Stat. 44 & 45 Vict. c. 41, s. 3.
(*h*) Above, p. 40.
(*i*) Above, p. 40.
(*k*) Above, p. 43.
(*l*) Above, pp. 44, 45.
(*m*) See 1 Davidson, Prec. Conv. 518 *sq.*, 5th ed.; 1 Key & Elph. Prec. Conv. 252 *sq.*, 4th ed.; 237 *sq.*, 8th ed.

Conditions of sale by auction of freeholds in one lot.

Particulars of sale.

The following is a simple form of conditions of sale by auction of freeholds in one lot. They are intended to be annexed to particulars of sale containing the description of the property offered. Great care should always be exercised in framing the particulars of sale in consequence of the vendor's obligation to produce, in fulfilment of the contract, a property corresponding exactly with that which he has described therein (*n*); and every precaution should be taken to ascertain that the land described in the particulars is not in point of quantity, tenure, estate, or in any other respect more extensive than or different from that which the vendor is able or intends to convey in performance of the agreement (*o*).

Bidding; right to bid reserved.

1. No person shall advance less than *l.* at a bidding, and no bidding shall be retracted (*p*). There will be a reserve price; and the vendor reserves the right to bid in person or by his agents as often as he or they may please (*q*). Subject to the rights so reserved to the vendor, the highest bidder shall be the purchaser. If any dispute shall arise respecting a bidding, the property shall be put up again and resold.

Deposit; contract to be signed.

2. The purchaser shall immediately after the sale pay a deposit of 10*l.* per cent. of his purchase-money into the hands of [*the auctioneer* or *the vendor's solicitors*] and sign the subjoined agreement (*r*).

Fixtures and timber to be paid for at a valuation.

3. The fixtures, timber and other trees, tellers, pollards, saplings and underwood upon the property, down to the value of 1*s.* per stick, shall be paid for by the purchaser at a valuation to be made as hereinafter provided, or failing such valuation, at their fair value (*s*). The valuation shall be made by two valuers to be appointed one by the vendor and the other by the purchaser, or by an umpire to be appointed by the valuers, or if

(*n*) Above, pp. 33, 41, 59, 60.

(*o*) See, as to the consequences of misdescription or misrepresentation in the particulars of sale, the cases cited above, pp. 33, 41, 42, 60, and below, Chaps. XII. § 4, XIII. § 1, XIV. § 1.

(*p*) See above, pp. 20, 52.

(*q*) See above, pp. 23, 24, 51, 52.

(*r*) See above, pp. 27, 52.

(*s*) See above, p. 55. In many cases it would be sufficient to say "by two valuers, or their umpire, to be appointed in the usual way, or otherwise at their fair value"; but this would not authorize one party's valuer, in case of the default of the other party or his valuer, to make a valuation binding on the other party. That is a matter which must be expressly provided for, if desired. See *Bos* v. *Helsham*, L. R. 2 Ex. 72.

either the vendor or the purchaser shall refuse or neglect to appoint a valuer or to notify his appointment of a valuer to the other party in writing within seven days after being requested by the other party to do so, or if the valuer appointed by either party shall refuse or neglect to act for seven days after receiving notice in writing from the other party requiring him to proceed with the valuation, then by the other party's valuer alone, provided that his appointment shall have been duly notified in writing to the opposite party (*t*).

Commencement of title.

4. The title shall commence with [*a deed or other instrument of such a date, the nature of which must be accurately set out* (*u*). *Any special conditions as to title, which may be necessary, may be inserted here*].

Time limited for making requisitions on title, &c.

5. The purchaser shall send his requisitions and objections (if any) in respect of the title and all matters appearing on the abstract, particulars or conditions to the office, No. —, —— Street, —— of Messrs. ——, the vendor's solicitors, within twenty-one days from the day of the delivery of the abstract, and in this respect time shall be of the essence of the contract (*x*). In default of or subject only to any such requisitions and objections so made, the purchaser shall be taken to have accepted the title.

Reservation to vendor of right to rescind the contract.

6. If the purchaser shall insist on any requisition or objection as to the title, evidence of title, conveyance, possession, receipt of rents or any other matter appearing on the abstract, particulars or conditions or connected with the sale, which the vendor shall be unable or unwilling to remove or comply with, the vendor shall be at liberty, notwithstanding any negotiation or litigation in respect of such requisition or objection (*y*), to give to the purchaser or his solicitor notice in writing of his intention to rescind the contract for sale unless such requisition or objection be withdrawn; and if such notice shall be given and the requisition or objection shall not be withdrawn within

(*t*) The last words are inserted to remind the parties of the fact, that the appointment of a valuer is not completely made until it has been notified to the opposite party; *Tew* v. *Harris*, 11 Q. B. 7.

(*u*) See above, p. 56.

(*x*) See above, p. 56.

(*y*) These words will not enable the vendor to rescind after final judgment has been given against him in a proceeding for determining the validity of some objection taken by the purchaser; *Re Arbib and Class's Contract*, 1891, 1 Ch. 601.

ten days after the day on which the notice was sent, the contract shall without further notice be rescinded (*z*). The vendor shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatever.

Identity.

7. The purchaser shall admit the identity of the property purchased with that comprised in the muniments offered by the vendor as the title to such property, upon the evidence afforded by a comparison of the descriptions contained in the particulars of sale and in the muniments (*a*).

No compensation for errors of description.

8. The property is believed, and shall be taken to be correctly described as to quantity and otherwise. The property is sold subject to all chief and other rents, all incidents of tenure, all easements and public rights (if any) charged or subsisting thereon, and to all leases, tenancies, and occupations, whether mentioned in the particulars of sale or not; and to all rights and claims of lessees, tenants and occupiers (*b*). If any error, misstatement, or omission be discovered in the particulars of sale, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof.

Completion.

9. The purchaser shall pay the remainder of his purchase-money, and the value of the fixtures, timber and other trees, tellers, pollards, saplings, and underwood, on the —— day of —— next, at the office aforesaid of Messrs. —— to the vendor or as he shall in writing or otherwise duly authorize. Upon such payment the vendor and all other necessary parties (if any) will execute a proper assurance of the property to the purchaser; but such assurance, and every other assurance and act (if any) which shall be required by the purchaser for getting in, surrendering, or releasing any outstanding estate, right, title,

(*z*) See above, p. 58.

(*a*) See above, p. 59.

(*b*) General words like these, which must of course be modified according to the nature of the property sold, are inserted to protect the vendor against rents, easements, or tenants' claims of which he may be unaware at the time of sale. They are binding on the purchaser at law, but they would not enable the vendor to enforce specific performance of the contract subject to any rents, easements, tenancies, tenants' claims or public rights, which would be serious incumbrances and were known to the vendor, but not mentioned in the particulars; *Heywood* v. *Mallalieu*, 25 Ch. D. 357; *Nottingham Brick & Tile Co.* v. *Butler*, 16 Q. B. D. 778; *Re Derby and Fergusson's Contract*, 1912, 1 Ch. 479, 488; see also *McGrory* v. *Alderdale Estate Co.*, 1918, A. C. 503, 507, 510, 512, where the sale was made by open contract; 1 Dart, V. & P. 156, 5th ed.; 177, 6th ed.; 172, 7th ed.; and see below, Chap. VI.

or interest, or for completing or perfecting the vendor's title, or for any other purpose, shall be prepared, made, and done, by and at the expense of the purchaser (*c*); and every such assurance shall be left at the office aforesaid not less than ten days before the said —— day of —— next.

Rents, outgoings, &c.

10. The rents will be received, possession retained and the outgoings discharged by the vendor up to the said —— day of —— next. As from that day the outgoings shall be discharged, the rents received and possession taken by the purchaser. The rents and outgoings shall, if necessary, be apportioned between the vendor and the purchaser for the purpose of this condition.

Interest.

If from any cause whatever the purchase shall not be completed on the said —— day of —— next, the purchaser shall pay interest on the remainder of his purchase-money and on the aforesaid value of the fixtures, timber and other trees, tellers, pollards, saplings and underwood, at the rate of ——*l.* per cent. per annum, from that day until the purchase shall be completed; and shall not be entitled to any compensation for the vendor's delay or otherwise (*d*).

Power of resale.

11. If the purchaser shall fail to comply with the above conditions, his deposit shall thereupon be forfeited, and the vendor shall be at liberty to resell the property at such time, in such manner and subject to such conditions, as he shall think fit; and any deficiency in price which may happen on, and all expenses, which may attend the resale, shall immediately afterwards be paid by the defaulter to the vendor and, in case of non-payment, shall be recoverable by the vendor as liquidated damages (*e*).

(*c*) Words like these have been held to throw upon the purchaser the costs of the concurrence in the conveyance of the vendor's mortgagees; *Re Willett and Argenti*, 5 Times L. R. 476; and of the conveyance of a legal estate outstanding in other persons than the vendor; *Re Woods and Lewis' Contract*, 1898, 1 Ch. 433, 434, 437, affirmed, 1898, 2 Ch. 211; but not the costs of deducing title to any outstanding estate; *Re Adams' Trustees and Frost's Contract*, 1907, 1 Ch. 695. But if it be intended that the purchaser shall bear the expense of the concurrence in the conveyance of necessary parties other than the vendor, it is better to make an express stipulation to that effect; see above, pp. 44, 61. If the vendor has a clear title in himself it is, of course, unnecessary, and it is simply depreciatory to stipulate that the purchaser shall bear the expense of getting in any outstanding estate.

(*d*) See above, p. 61.

(*e*) See above, pp. 48-50, 65.

Memorandum to be indorsed on the conditions.

I [*insert name and description*] hereby acknowledge that on the sale by auction this —— day of —— of the property mentioned in the foregoing particulars I was the highest bidder and was declared the purchaser thereof subject to the foregoing conditions at the price of ——*l.*, and that I have paid the sum of ——*l.* by way of a deposit and in part payment of the said purchase-money to [*the auctioneer*] and I hereby agree to pay the remainder of the said purchase-money and complete the said purchase according to the aforesaid conditions.

As witness my hand this —— day of ——.

[*Purchaser.*]

As agent for Mr. [*insert vendor's name and description* (*f*)] the vendor, I ratify this sale and acknowledge the receipt of the said deposit of ——*l.*

[*Auctioneer.*]

The above conditions are in common form; but they are of course drawn exclusively in the vendor's interest. It is not found, however, that purchasers are deterred from bidding by such conditions, at all events, in London sales (*g*). In the provinces, lands are often sold subject to the common form conditions of the local law society; and some of these conditions are far more favourable to purchasers than those set out above (*h*).

(*f*) See above, p. 5.

(*g*) This seems to have been the case during the latter half of the last century; see 1 Davidson, Prec. Conv. 505, 505, 4th ed.; Juridical Society Papers, ii. 589 *sq.* Before this, the conditions of sale by auction were usually far less stringent; see 2 Sug. V. & P. 1076, 11th ed.

(*h*) Thus under the common form conditions of sale of the Birmingham Law Society, the purchaser expressly contracts to pay interest at 5*l.* per cent. on delay in completion, but is allowed, if such delay shall arise from any cause other than his own neglect or default, to appropriate his money to the purchase by placing it to a deposit account in a bank and giving notice of such deposit, and is thenceforth chargeable only with the interest given on the deposit; the expense of perfecting the vendor's title or of conveyance by necessary parties other than the vendor is left to fall on the vendor; the vendor has to bear the cost of production of any documents, which are in the possession of a mortgagee, or other incumbrancer, or of a person obliged to produce them at the vendor's request; the vendor is empowered to rescind only if he is unable or on the ground of expense unwilling to comply with some requisition; and compensation is to be given for errors of description if pointed out before completion. The conditions of the Bristol, Liverpool and Manchester Law Societies are nearly as favourable to purchasers.

General condition on sale under a trust for or power of sale.

Besides the above conditions, it is usual, where the vendor is selling under a trust for or power of sale (*i*), to add the following stipulation (*k*):—

"The vendor is a trustee (*l*) selling under a trust for (*m*) sale, and the purchaser shall not require the concurrence of the persons beneficially interested in the property sold or the purchase-money, and shall not be entitled to any other covenant than the statutory covenant by the vendor that he has not incumbered, or to any undertaking or covenant for safe custody of any document which the vendor is entitled to retain."

The reason of this is that, though one who shows on the face of the contract that he sells as a trustee, cannot be called upon to give covenants for title, but can only be required to covenant that he personally has not incumbered (*n*), a trustee, who sells as apparent owner under a contract in which his fiduciary capacity is not disclosed, appears to undertake the duties regularly imposed on a vendor of land (*o*) to give covenants for title and an undertaking for safe custody of any deeds retained. And where, on a sale by a trustee, the purchase-money will belong to some person or persons being *sui juris* and absolutely entitled thereto, either entirely or in shares, it has been the practice of conveyancers, unless precluded by express stipulation, to require him or them to concur in the conveyance and give covenants for title to the property sold or their shares therein (*p*). A stipulation similar to that given above is usually made on sales by a mortgagee under his power of sale (*q*), precluding the purchaser from requiring the concurrence of the persons entitled to the equity of redemption (*r*).

Sale by mortgagee under his power of sale.

Special conditions of sale.

A few words may be added here with regard to what are called special conditions of sale, which are conditions requiring the purchaser to accept a title shorter or otherwise less perfect than he would be entitled to demand under an open contract, or

(*i*) As to sales by trustees, see below, Chap. VIII. § 2.
(*k*) 1 Davidson, Prec. Conv. 612, 613, 4th ed.; 1 Key & Elph. Prec. Conv. 264, 4th ed.; 278, 10th ed.
(*l*) Or *an executor*, or *an administrator*, as the case may require.
(*m*) Or *power of*, as the case may require.
(*n*) *Worley* v. *Frampton*, 5 Hare, 560; Sug. V. & P. 69, 575; below, Chap. XII. § 3.
(*o*) Above, pp. 43-45.
(*p*) See below, Chap. XII. § 3.
(*q*) See below, Chap. IX.
(*r*) See above, n. (*k*).

to take the property sold subject to some incumbrance, easement or right in favour of other persons. Such conditions, in order to be completely binding on the purchaser, must be framed with very great care. It is true that, at law, a purchaser may be bound by a contract to buy a property subject to some defect of title or otherwise, according to the plain meaning of the words used; and so may have no right to recover his deposit if he object to comply with the condition (*s*). But in equity a vendor will not be entitled to enforce the specific performance of such a contract unless he has acted in the greatest good faith. If therefore the special condition be in any way misleading, that is, if it do not fairly and explicitly call the purchaser's attention to the defect to which he is to submit, or if it contain any material misrepresentation however innocently made, as to a matter of fact, the Court will not oblige the purchaser specifically to perform the contract (*t*). And if the condition be obscurely or ambiguously expressed, it will be construed in favour of the purchaser (*u*). But if the facts of the case be honestly and clearly stated, the condition will be binding, although the legal effect of the facts be not stated (*x*). A very common instance of a special condition of sale is that requiring a purchaser of freeholds to accept a title commencing with some instrument less than forty years old; in such cases, as we have seen, the vendor cannot enforce specific performance according to the letter of the contract, if this instrument be not a good root of title (*y*). When it is intended that the title shall commence with an instrument, which is not in itself a good root of title, care must be taken that the special condition discloses the nature of the instrument. Thus if it be desired to

Title commencing with an instrument not a good root of title.

(*s*) *Best* v. *Hamand*, 12 Ch. D. 1; *Re Davis and Cavey*, 40 Ch. D. 601, 607; *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Scott* v. *Alvarez*, 1895, 2 Ch. 603; above, p. 37; below, Chap. VI.

(*t*) *Re Banister, Broad* v. *Munton*, 12 Ch. D. 131; *Re Marsh and Earl Granville*, 24 Ch. D. 11; *Nottingham Patent Brick & Tile Co.* v. *Butler*, 16 Q. B. D. 778; above, p. 37; below, Chaps. VI., XIX. § 3. As to fraudulent misrepresentation, see *Edwards* v. *M'Leay*, G. Coop. 308, 2 Sw. 287; *Hart* v. *Swaine*, 7 Ch. D. 42; *Joliffe* v. *Baker*, 11 Q. B. D. 255; below, Chap. XIV. § 1.

(*u*) *Symons* v. *James*, 1 Y. & C. C. C. 487, 490; *Seaton* v. *Mapp*, 2 Coll. 556, 562; *Rhodes* v. *Ibbetson*, 4 De G., M. & G. 787.

(*x*) *Smith* v. *Watts*, 4 Drew. 338; *Re Sandbach and Edmondson's Contract*, 1891, 1 Ch. 99; *Blaiberg* v. *Keeves*, 1906, 2 Ch. 175; compare *Williams* v. *Wood*, 16 W. R. 1005.

(*y*) *Re Marsh and Earl Granville*, 24 Ch. D. 11; above, pp. 39, 56.

commence with the conveyance of an equity of redemption, a transfer of a mortgage not reserving a new equity of redemption, a deed exercising a power or a disentailing assurance (*z*), it should be explicitly stated that the deed, with which the title is to commence, is the conveyance of an equity of redemption or such other assurance as above mentioned; and it is useful to stipulate that it shall be accepted as a sufficient root of title (*a*).

Title commencing with general devise.

So also on the sale of any property, to which the title is to commence with a general devise of the testator's real estate, it should be stipulated that the title shall commence with such a devise, and that no proof shall be required of the vendor's seisin of the property sold (*b*).

With voluntary conveyance.

And when the title is to commence with a voluntary conveyance, the nature of the instrument should be stated (*c*).

Sale of an equity of redemption, or property subject to some charge or easement.

If the vendor is selling an equity of redemption only, or a property subject to any existing charge or easement, which he does not propose to pay off or procure to be released, he must be careful to state the fact or stipulate that the property is sold subject to the charge or easement in question (*d*).

Indemnity to be accepted against defect of title.

And whenever it is intended that the purchaser shall accept an indemnity, whether by way of a covenant or otherwise, against an existing incumbrance, which is not to be discharged, or a defect of title, which cannot be removed, a special stipulation to this effect must be made (*e*) So if it be intended that the purchaser shall take the land subject to covenants restrictive of its user, it must be clearly indicated that he is to buy subject to an incumbrance of this nature (*f*). The construction of special conditions of sale is the same, whether they be made on a sale by public auction, or contained in a contract of private sale (*g*).

Proof of facts stated as ground of special conditions.

It should be noted that any facts stated in conditions of sale as the ground of special stipulations restricting the

(*z*) See below, Chap. IV. § 2.

(*a*) For forms of such stipulations, see below, Appendix (A), Special Conditions 14, 16, 1, 19, 23.

(*b*) See below, Chap. IV. § 2; and for a form of such a stipulation, Appendix (A), Special Condition 7.

(*c*) See *Re Marsh and Earl Granville*, 24 Ch. D. 11: but it does not appear that this is strictly necessary where the deed in question is forty years old; see below, Chaps. IV., VI.; and for a form of such a stipulation, Appendix (A), Special Condition 17.

(*d*) For forms of such stipulations, see below, Appendix (A), Special Conditions 15, 1, 18.

(*e*) See below, Chap. XII. §§ 3, 4, and for forms of such a stipulation, Appendix (A), Special Conditions 1, 5.

(*f*) See *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778.

(*g*) *Rhodes* v. *Ibbetson*, 4 De G., M. & G. 787, 793.

purchaser's rights must be proved, unless it be further provided that such proof shall not be required (*h*).

Other stipulations usually made in certain particular cases.

It may also be convenient, in discussing the subject of conditions of sale by auction, to point out various other stipulations in the vendor's favour, which are usually made in certain particular cases. Thus, whenever it is known or apprehended that any document of title executed before or on the 16th of May, 1888, is or may be unstamped or insufficiently stamped (*i*), it is provided that no objection shall be taken on that account, and that if the purchaser shall require any such document to be stamped or further stamped, such stamping shall be effected by him and at his expense (*k*). So, on the sale of land in Middlesex or Yorkshire, or of unregistered land in the county of London (*l*), it is usual to stipulate that no objection shall be taken or requisition made on account of any document which should or might have been registered in the county register not being so registered (*m*). Where any mortgage to joint mortgagees forms part of the title, and one of them has died, or where such a mortgage is subsisting, so that one of them might die before completion, it is useful to provide that no proof shall be required of the discharge of any estate duty, which may apparently have become payable on the death of any one of them, in order to avoid being obliged to disclose (what is generally the case) that the mortgagees were trustees (*n*). And it is frequently convenient to stipulate that no proof shall be required of the discharge of any succession or estate duty payable on any death, which occurred more than twelve years before the sale; and so to avoid an obligation which is incumbent on vendors, notwithstanding that the liability to pay such duties

Insufficiently stamped documents executed before 17th May, 1888.

Unregistered documents on sale of land in Middlesex or Yorkshire or of unregistered land in London.

Estate duty on death of a joint mortgagee.

Death duties on deaths over twelve years ago.

(*h*) *Symons* v. *James*, 1 Y. & C. C. C. 487; 1 Dart, V. & P. 163, 5th ed.; 180, 7th ed.; 1 Davidson, Prec. Conv. 543, 544, 4th ed.; 446, 447, 5th ed.; 1 Key & Elph. Prec. Conv. 320, n. (*b*), 10th ed.

(*i*) See above, p. 43. Such a condition, if made as to documents executed after that day, is void by stat. 54 & 55 Vict. c. 39, s. 117, re-enacting 51 & 52 Vict. c. 8, s. 20; see below, Chap. IV. § 3.

(*k*) 1 Key & Elph. Prec. Conv. 255, 263, 4th ed.; 261, 276, 10th ed.; Davidson's Concise Precedents, 121, 19th ed. For a form of such a stipulation, see Appendix (A), General Condition 16, below.

(*l*) See below, Chap. X. § 3.

(*m*) 1 Key & Elph. Prec. Conv. 263, 4th ed.; 276, 10th ed.; Davidson's Concise Precedents, 121, 19th ed. For a form of such a stipulation, see Appendix (A), General Condition 16, below.

(*n*) See below, Chap. VIII. § 1; and for a form of such a stipulation, Appendix (A), General Condition 18.

may be barred, as against the purchaser, by the Inland Revenue Act, 1889 (*o*). Where the title includes any assurance by or to any corporation (including any incorporated company) or building, friendly or industrial and provident society, it is desirable to stipulate that no proof shall be required of its incorporation or constitution, or regulations or rules, or of the appointment of any officer or trustee thereof, and that the persons executing any such assurance or giving any receipt on behalf of the corporation or society shall be assumed to have been the proper persons duly appointed or authorised so to act on its behalf (*p*). For if no such condition be made, the vendor will be liable to furnish strict proof, not only of the incorporation or constitution of the corporation or society, and of its regulations as to the execution of assurances binding it, but also of the appointment of any officer thereof (as a secretary, director or trustee) who is by such regulations the proper person to attest or concur in such execution or to give a receipt for any money payable to it (*q*). And when any buildings are sold, and it is desired (as it usually is) to give to the purchaser the benefit of the existing fire insurance, it should be stipulated that he shall take such benefit subject to the consent of the insurers being obtained thereto by himself, and to the purchase being completed, and to his paying a proportionate part of the premium, and that the vendor shall not be bound to keep up or renew the insurance (*r*).

Proof of constitution or regulations or appointment of officer of corporation, company, or building, friendly or industrial and provident society.

Fire insurance.

Whenever land is to be sold with an exception of the mines and minerals thereunder, the mines and minerals must be expressly excepted from the sale; and if it be desired to reserve any more extensive mining liberties or powers than are incident by law to such an exception, the liberties or powers, which it is intended to reserve, must be fully stated in the conditions of sale. And if it be proposed to reserve power to work the mines so as to let down the surface, it is especially necessary that the conditions should so provide in clear and explicit terms (*s*).

Exception of mines.

Reservation of mining liberties—

Of power to let down the surface.

(*o*) See stat. 52 Vict. c. 7, s. 12 (1); below, Chap. XXI.; and for a form of such a stipulation, Appendix (A), General Condition 18.

(*p*) See below, Chap. XVI.; and for a form of such a stipulation, Appendix (A), General Condition 19.

(*q*) See below, Chap. XVI.

(*r*) See below, Chap. XI. § 1; and for a form of such a stipulation, Appendix (A), General Condition 15.

(*s*) See below, Chap. X. § 5; and for a form of such an exception and reservation, Appendix (A), Special Condition 4.

Reservation of new easement.

If it be intended to reserve, in the vendor's favour, some new easement over land offered for sale, it must be expressly so stipulated in the conditions of sale. And it is particularly necessary to remember this when any land is to be sold, over which the vendor has been enjoying any advantage in the nature of an easement, such as an approach by road or the access of light, for the benefit of some other land of his not included in the sale (*t*).

Land sold with the benefit of existing easements or rights of common.

On the sale of land with the benefit of existing easements or rights of common enjoyed therewith, it is often desirable to modify the vendor's liability to prove his title thereto, and to stipulate that no evidence of the title to such easements or rights shall be required beyond what is in the vendor's possession, coupled with a declaration of the exercise of such easements or rights for a certain number of years past (*u*).

Property sold free of tithe or land tax.

When any property is sold tithe free or free of land tax, it should be stipulated that no proof of this shall be required, or none except a declaration that no tithe rent-charge or land tax has been paid for a certain number of years past, or except such other evidence as the vendor can conveniently furnish (*x*): otherwise the vendor will be put to strict proof of his assertion (*y*).

Sale of leaseholds.

Again, whenever leasehold land is sold, it is advisable to state that the property is sold subject to the rent, covenants, conditions, and all liabilities under the lease, whereby the same is held; to give to intending purchasers the opportunity of inspecting the lease at the office of the vendor's solicitors within a limited time before the sale; and to provide that the purchaser, whether he shall avail himself of this opportunity of inspection or not, shall be deemed to have full notice of the contents of the lease, whether of a usual character or not (*z*).

Purchaser to have an opportunity of inspecting the lease, and to be deemed to buy with full notice of its contents.

Production of last receipt

And it is also desirable to stipulate expressly that the production of a receipt

(*t*) See below, Chap. XII. § 3; and for forms of such stipulations, Appendix (A), General Condition 6, and Special Conditions 21 and 22.

(*u*) For a form of such a stipulation, see below, Appendix (A), General Condition 9; 1 Key & Elph. Prec. Conv. 349, 10th ed.

(*x*) See below, Appendix (A), Special Condition 20, for a form of such a stipulation; also 1 Davidson, Prec. Conv. 690, 4th ed.; 557, 558, 5th ed.; 1 Key & Elph. Prec. Conv. 306, 307, 4th ed.; 364, 365, 10th ed.; Davidson's Concise Precedents, 126, 19th ed.

(*y*) See below, Chap. V.

(*z*) 1 Key & Elph. Prec. Conv. 269, 270, 4th ed.; 288, 289, 10th ed.; see below, Chap. X. § 2; and for a form of such a stipulation, Appendix (A), Special Condition 11.

for the last payment of rent accrued due under the lease prior to completion shall be accepted as conclusive evidence that all the covenants and conditions in the lease have been duly performed and observed; and that it shall be assumed without proof that the person or persons giving such receipt, though not the original lessor, are the reversioner or reversioners expectant on such lease or his or their authorized agents (*a*). Where the lease contains a covenant to repair, and the property is out of repair, an opportunity of inspecting the property should (if possible) be given to intending purchasers, and it should be provided that they shall be deemed to buy with full notice of the actual state and condition of the property, as to repair or otherwise, *and shall take the same as it is* (*b*). The above stipulations should never be omitted, in the vendor's interest, on a sale of leaseholds (*c*). It is also common (though not necessary (*d*)) to stipulate expressly that the purchaser shall covenant in the deed of conveyance to pay, perform and observe, and to indemnify the vendor against the rent and covenants of the lease; and it is desirable further to provide (what is a modification of the rule of law (*e*)) that for this purpose the purchaser shall, at his own expense, procure to be prepared and stamped, and execute and deliver to the vendor a duplicate of the deed of conveyance (*f*).

for rent to be *conclusive* evidence of performance of covenants.

Person giving such receipt to be assumed to be reversioner.

Purchaser to buy with notice of the state of repair and take property out of repair as it is.

Purchaser to give the usual covenant of indemnity.

And execute at his own expense a duplicate of the conveyance.

(*a*) 1 Key & Elph. Prec. Conv. 254, 270, 4th ed.; 260, 289, 10th ed.; Davidson, Concise Prec. 121, 19th ed.; see below, Chap. X. § 2; and for a form of such a stipulation, Appendix (A), Special Condition 11.

(*b*) See below, Chap. X. § 2; and for a form of such a stipulation, Appendix (A), General Condition 13.

(*c*) See below, Chap. X. § 2. (*d*) See below, Chap. XII. § 3.

(*e*) It is thought that, in the absence of special stipulation, a vendor of leaseholds would be entitled to require a duplicate of the conveyance to be executed and handed over to him, but would have to bear the expense of engrossing and stamping it. The rule appears to be that any party to a contract for sale of land, *to* whom any benefit is to be assured by the conveyance, is as regards that benefit a purchaser, and is therefore entitled to have a duplicate of the deed of conveyance to keep as evidence of his title, but must therefore himself bear any extra expense occasioned by such conveyance to himself; see above, p. 43; Litt. s. 370; Co. Litt. 229a and note. This rule seems to be exemplified in the case of the grant of a lease, when the lessor has to bear the expense of the counterpart; *Re Negus*, 1895, 1 Ch. 73, 81; *Re Gray*, 1901, 1 Ch. 239, 243, 244; *Re Cohen and Cohen*, 1905, 1 Ch. 345, 350. And it is thought that it applies in every case, in which a purchaser of land is bound to enter into a covenant to indemnify the vendor; see below, Chap. XII. § 3.

Rule as to requiring a duplicate of the conveyance.

(*f*) 1 Key & Elph. Prec. Conv. 271, 4th ed.; 290, 291, 10th ed.; and for forms of such a stipulation, see Appendix (A), General Condition 22 and Special Condition 8.

Sale of land held by underlease.

Where the land to be sold is held by underlease, it should be stated to be so held, and must not be represented as being held by lease (which is intended to mean a lease from the freeholder) (*g*); the property should be sold subject to the rent and covenants, &c. of the lease, under which it is held, *and of every superior lease;* and the stipulations above recommended on the sale of leaseholds should be adapted to the case, provision being made that production of the receipt for the rent last due before completion under the lease, whereby the property is held, shall be conclusive evidence of the performance of all the covenants and conditions of that lease *and of every superior lease* (*h*).

Leaseholds held under lease comprising other property.

And on the sale of leaseholds held under a lease comprising other property than that sold, the vendor must be careful to state that the property is so held and provide that the purchaser shall take it (*i*).

Leaseholds not assignable without landlord's licence.

On the sale of leaseholds subject to a covenant not to assign without the landlord's licence, the fact should be stated and it should be stipulated that, if such licence cannot be obtained, the contract shall be rescinded, the deposit returned, and the vendor not be liable to pay the purchaser's expenses (*j*).

Sale of land subject, together with other lands, to some rent.

Where the property sold is subject, together with other property, to some rent (whether rent service, rent seck, or rent-charge), it is generally provided, in order to avoid the necessity of the concurrence of the owner of the rent, that the property is sold subject to such rent, and the purchaser shall bear some specified proportion thereof, but shall not require any legal apportionment thereof to be made (*k*); and the vendor agrees either to covenant to pay and to indemnify the purchaser against payment of the rest of the rent, or to grant to him by way of further indemnity a rent-charge in fee of an amount equal to the remainder of the rent to issue out of other lands belonging to the vendor (*l*). And where the land sold is subject, together

(*g*) See below, Chap. IV. § 1; Chap. X. § 2.

(*h*) 1 Key & Elph. Prec. Conv. 271, 4th ed.; 289, 290, 10th ed.; Davidson's Concise Precedents, 121, 19th ed. For a form of such a stipulation, see Appendix (A), Special Condition 11, below.

(*i*) See below, Chap. X. § 2; and for a form of such a stipulation, Appendix (A), Special Condition 24.

(*j*) See below, Chap. X. § 2; and for a form of such a stipulation, Appendix (A), Special Condition 25.

(*k*) As to the apportionment of such rents, see below, Chap. X. § 6.

(*l*) See below, Chap. XII. § 4; and for forms of such stipulations,

with other land, to a lease reserving rent, it is usual to stipulate that the purchaser shall be entitled to some specified portion of the rent, but shall not require any legal apportionment of the rent to be made (*m*). Also in the case of the sale of any property, which is from its situation or condition liable to become subject to some charge or to give rise to some liability at the instance of some local authority under some Local Management or Improvement Act, or the Public Health Act, 1875 (*n*), or the Private Street Works Act, 1892 (*o*), as for the expenses of paving, sewering, or lighting an adjoining street, or of complying with a "dangerous structure" notice (*p*), it is not unusual to make a special stipulation with respect to the incidence of the charge or liability (*q*); and, of course, the stipulation most favourable to the vendor is to cast the burthen of payment on the purchaser, whether the notice or other event, which gave rise to the liability, were served or occurred before or after the sale (*r*).

Sale of land subject, together with other land, to a lease reserving rent.

Sale of property liable to become subject to some statutory charge at the instance of a local authority.

Where land is sold by auction in lots, stipulations similar to those set out and discussed above (*s*), are invariably made (where appropriate), but they are, of course, expressed to bind the purchaser of any lot. There are, however, certain matters for which special provision should be made on a sale of land in lots. Thus it is proper to provide that any documents forming part of the title to several lots shall be retained by the vendor

Sale of land by auction in lots.

Custody of title-deeds to several lots.

Appendix (A), General Condition 17 and Special Condition 5; 1 Davidson, Prec. Conv. 544, 684 *sq.*, 4th ed.; 451, 551 *sq.*, 5th ed.; 1 Key & Elph. Prec. Conv. 337 *sq.*, 4th ed.; 398 *sq.*, 10th ed.

(*m*) See below, Chap. X. § 5; Chap. XII. § 4; and for a form of such a stipulation, Appendix (A), General Condition 17; 1 Davidson, Prec. Conv. 691, 4th ed.; 558, 5th ed.

(*n*) Stat. 38 & 39 Vict. c. 55, see ss. 41, 150, 257, and stat. 53 & 54 Vict. c. 59, s. 19.

(*o*) Stat. 55 & 56 Vict. c. 57.

(*p*) See below, Chap. XI. § 1.

(*q*) As to the incidence of such charges in the absence of special stipulation, see cases cited above, p. 46, n. (*p*); below, Chap. V.; Chap. XI. § 1; Chap. XII. § 2. A special stipulation of this kind, casting the liability on the vendor or the purchaser according as the requirement or demand creating it is made before or after the sale, is contained in the common form conditions of sale of the Birmingham Law Society; and the Bristol, Liverpool, and Manchester Law Societies' conditions of sale contain a stipulation throwing these expenses on the purchaser where the requirement is made after the sale.

(*r*) See the form of stipulation given in Appendix (A), General Condition 14, below; and compare with it the form of stipulation given in Appendix (B), note to Condition 9.

(*s*) Pp. 64-67.

until all those lots have been sold, whether at the auction immediately contemplated or some future sale, and shall then be delivered to the purchaser who shall then have bought the largest part in value of those lots (*t*). Where leasehold lands held under one lease at one entire rent are sold in lots, it is usual to stipulate that the purchaser of the largest part in value of those lots shall take an assignment of the lease and the purchasers of the other lots shall take underleases at specified rents from him or from the vendor (*u*). And on the sale in lots of freehold land subject to one entire rent (whether rent service, rent seck, or rent-charge), it is commonly stipulated that all the purchasers shall buy subject to the rent and shall have no right to require it to be legally apportioned; but provisions are made for charging the rent, as between the purchasers, either entirely on one or in specified proportions on more or on all of the lots, and for granting new rent-charges to issue out of the lot or lots so to be charged in order to indemnify any purchaser against having to pay a greater proportion (if any) of the rent than is so agreed to be charged on the lot bought by him (*x*). When land is put up for sale in lots, as to which it is proposed that the purchasers shall enter into covenants restrictive of the user thereof, then unless the vendor be willing that any lots remaining on his hands unsold shall be subject to the same restrictions, care should be taken to stipulate that, as regards any lot or lots which shall not be sold, the vendor shall not stand in the purchaser's place so as to be bound by the covenants (*y*). On a sale of land in lots, a separate contract arises, as a rule, in respect of the sale of each lot (*z*). But any number of lots may be included in one written memorandum (*a*). Under the Conveyancing Act, 1881, on a sale of any property in lots, a purchaser of two or more lots held wholly or partly under the same title has no right to

Sale of leaseholds in lots.

Sale in lots of freeholds subject to a rent.

Sale of land in lots subject to restrictive covenants.

Separate contract arises for sale of each lot.

Purchaser of several lots entitled to one abstract

(*t*) See below, Chap. XII. § 3; and for a form of such a stipulation, Appendix (A), General Condition 23.

(*u*) See below, Chap. X. § 2; and for a form of such a stipulation, Appendix (A), Special Condition 8.

(*x*) See above, p. 76, n. (*l*); and for forms of such stipulations, Appendix (A), General Condition 17 and Special Condition 5.

(*y*) See below, Chap. X. § 12; and for a form of such a stipulation Appendix (A), Special Condition 6 (9).

(*z*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *Holliday* v. *Lockwood*, 1917, 2 Ch. 47, 55.

(*a*) See *Dykes* v. *Blake*, 4 Bing. N. C. 463, 477; *Franklyn* v *Lamond*, 4 C. B. 637; *Holliday* v. *Lockwood*, 1917, 2 Ch. 47, 53—55; also Sug. V. & P. 42; Fry, Sp. Perfce. § 825.

more than one abstract of the common title, except at his own expense (*b*); so it is unnecessary to make any special stipulation to this effect (*c*). A form of conditions of sale by auction of freehold and leasehold land in lots, giving examples of all the stipulations discussed above (*d*), and containing special conditions as to the vendor's title, is given in the Appendix (*e*).

only of the common title.

Having thus considered the conditions usually made on sales by auction, it remains to inquire what stipulations are generally inserted in formal agreements for sale by private contract. The practice in this respect has undergone remarkable fluctuation. We find that down to the end of the first half of the last century vendors were apparently content to undertake by express stipulation the obligations which the law cast upon them in the case of an open contract; notwithstanding that those obligations, including the duty of proving a good sixty years' title at the vendor's expense, were far more onerous than they are at present (*f*). After this, a time of exceptional prosperity brought about a brisk market for the sale of land, and purchasers could be found who would agree, not only on sales by auction (*g*), but on private sales, to stipulations limiting the time for deducing title, giving the vendor the right to rescind in case of a disagreeable requisition, throwing upon the purchaser the expense of procuring all evidence of title not in the vendor's possession and even of the concurrence in the conveyance of all necessary parties other than the vendor, and binding the purchaser to pay interest on delay in completion "from any cause whatever" (*h*). Then legislation took place, entirely in vendors' favour; and not only was the time for deducing title limited to forty years on open contracts (*i*), but the expense of procuring all evidence of title not in the vendor's possession was thrown on the purchaser in the absence of stipulation to the contrary (*k*). By this time the sale of land subject to special

Stipulations in formal contracts for private sale.

(*b*) Conveyancing Act, 1881, stat. 44 & 45 Vict. c. 41, s. 3 (7).
(*c*) Such a stipulation was usual before the year 1882; 1 Dart, V. & P. 126, 5th ed.; 1 Davidson, Prec. Conv. 526, 640, 4th ed.
(*d*) P. 51 *sq.*
(*e*) Appendix (A), below.
(*f*) See 1 Bythewood & Jarman, Prec. Conv. 3rd ed. by Sweet (1841), pp. 490, 500; Sug. V. & P. 52, 1076, 11th ed. (1846).
(*g*) Above, p. 68, n. (*g*).
(*h*) See Juridical Society Papers, ii. 589 *sq.*; Davidson, Prec. Conv. vol. ii. pt. i. 1-20, 4th ed. (1877).
(*i*) Stat. 37 & 38 Vict. c. 78, s. 1.
(*k*) Stat. 44 & 45 Vict. c. 41, s. 3 (6).

stipulations drawn entirely in the vendor's interest had become so much a matter of course that conveyancers engaged in settling contracts for sale on the purchaser's behalf had almost abandoned even the claim to protest (*l*). Recently, however, a change has again taken place. Judicial decisions upon the construction of the enactment making the purchaser pay for all evidence of which the vendor is not possessed, have shown that it may work most unfairly to the purchaser, who has been held liable to pay the expense of the production of title-deeds in the possession of the vendor's mortgagees (*m*), and of searching for a leading title-deed which was absent from the vendor's possession (*n*). It has also been shown that the contract to pay interest on delay in completion from any cause whatever (*o*) and the stipulation requiring the purchaser to pay the costs of getting in outstanding estates (*p*) may work great hardship on a purchaser. Owing to these decisions, it is thought that practitioners are again becoming sensible of the duties incumbent on them when acting for a purchaser; and when on private sales vendors propose the same stipulations as they would make on a sale by auction, it is no longer a matter of course that the purchaser's advisers shall receive the proposal with supine acquiescence. Of course bargaining about the conditions of sale is like bargaining about the price. The ultimate decision depends on the willingness of one party to give in rather than lose the contract. But a purchaser has such good reason for objecting, on a private sale, to the conditions usual on sales by auction that it appears foolish to agree to them without negotiation. He is likely to succeed in some, if not all of his contentions; and even where he finds himself reduced to the alternative of withdrawing his objection or abandoning the purchase, he will often have extracted valuable information showing why the vendor refuses to give way, and helping him materially in exercising his own judgment.

Vendor's reasons for not desiring an open contract.

The main reasons why a vendor does not usually desire to sign an open contract are these:—he wants to obtain a deposit as a guarantee for the due performance of the contract; he

(*l*) See 1 Key & Elphinstone's Prec. Conv. 283, n., 2nd ed.; 348, n., 4th ed.; 316, n., 5th ed.
(*m*) *Re Willett and Argenti*, 5 Times L. R. 476.
(*n*) *Re Stuart, Olivant and Seadon's Contract*, 1896, 2 Ch. 328.
(*o*) See above, p. 61.
(*p*) Above, p. 67, n. (*c*).

probably does not want to make out the whole forty years' title as required by law; he desires above all to be able to rescind if a too onerous requisition be made; and he wants the time stipulation as to making requisitions (*q*) and the express contract to pay interest on delay from any cause whatever (*r*), in order to avoid the leisurely procedure sanctioned by the rule that time is not of the essence of the contract (*s*). But the purchaser has only one reason for avoiding an open contract, namely, the unfavourable position in which the law places him as regards the expenses of evidence not in the vendor's possession. In all other respects an open contract is decidedly advantageous to him; he pays no deposit, can insist on a good forty years' title without fear that a necessary but unwelcome requisition will be met by a notice to rescind, can require the vendor to get in outstanding estates or incumbrances at his own expense, and need pay no interest on delay in completion caused by the state of the title or the vendor's fault (*t*). On the whole, it seems advisable for an intending purchaser always to offer, and if he can, to procure the signature of an open contract. If the vendor be anxious to sell and satisfied with the price proposed, such an offer will bring home to him the advantage of binding the purchaser definitely and at once instead of disputing over special stipulations, each of which gives the buyer an opportunity of retiring. And if the purchaser profess his willingness to sign an open contract from the first, he will occupy a favourable position for negotiating as to any special stipulations. I am willing, he may point out to the vendor, to buy under the conditions imposed by law; you wish to modify them. Be it so; but it is, to say the least, unfair that every special stipulation should be in your favour. If you expect to have the great advantages of receiving a deposit and being enabled to rescind on receiving an unwelcome requisition, advantages which you can only acquire by special stipulation, you must at least purchase them by equivalent concessions to me. If you claim to be entitled, contrary to the general rule of law (*u*), to rescind a concluded contract because of your inability or unwillingness to fulfil an

(*q*) Above, p. 56.
(*r*) Above, p. 61.
(*s*) Above, p. 53.
(*t*) See above, pp. 27, 32, 39, 44, 47.
(*u*) Above, p. 58.

obligation, which is one of the main duties of that contract (*x*), I on my part claim to be entitled to rescind the contract and to have my deposit returned to me, if you should fail to show such a title according to the contract as a Court of Equity would oblige me to accept, or if you should otherwise fail to prove the right to enforce as plaintiff the specific performance of the contract. And I particularly insist on this right to rescind for what would after all be your default in performing one of the main duties you propose to undertake, if you claim to have the express right to re-sell the property in case of *my* default. I object also to be bound to pay the expenses of the production or of searching for title deeds, which I naturally expect to be in your possession. And it is utterly unreasonable that you should expect me to contract to pay interest on delay caused by your fault.

Points to be considered in settling a private contract.

In settling a private contract then, the object of the draftsman acting for the vendor will usually be to obtain the insertion of the stipulations made on sales by auction: while the duty of a conveyancer acting on the purchaser's behalf is to oppose such provisions in all points where they can be shown to be unreasonable. We will now go through the clauses in detail.

Deposit.

The payment of a deposit is not an unreasonable requirement, and is usually demanded, unless the purchaser be a person of well-known solvency (*y*). Nor can such a requirement work unfairly to the purchaser, if the contract be in other respects an open contract; provided he be careful to stipulate for payment of the deposit to some responsible person as stakeholder, and not to the vendor himself or to his solicitor as his agent (*z*). But if it be proposed that the contract shall contain special stipulations as to title, a purchaser paying a deposit may find himself in this predicament, which is by no means uncommon:—the special condition may be considered in equity to be so unfairly drawn that the Court will not enforce specific performance at the vendor's suit without his complying with some requirement as to title, which is prohibited by the letter of the condition (*a*). The vendor may decline to do this; and the pur-

(*x*) Above, pp. 31, n. (*b*), 35, 39.
(*y*) Davidson, Prec. Conv. vol. ii. pt. i. p. 4, 4th ed.
(*z*) See above, p. 28.
(*a*) Above, pp. 37, 66, n. (*b*).

chaser cannot force him to do it, because if the *purchaser* apply for specific performance, the vendor would not be bound to prove more than a good title according to the contract (*b*); and even if he failed to prove this, the purchaser would be obliged either to waive his objections to the title and pay the costs of the inquiry into title (*c*), or to submit to have his application dismissed without costs (*d*). And if, in such circumstances, the purchaser seek to recover his deposit, he will fail, because that is a matter depending solely on the effect of the contract at law. And the common law, not recognising the unfairness which in equity prevents the vendor from enforcing the contract specifically, will regard the purchaser repudiating the letter of the special condition as having broken the contract, and will not therefore aid him to recover the deposit (*e*). And if he complain of hardship, he will probably be told that he was a fool to buy land on special conditions as to title. These conditions ought to be present in the mind of a purchaser's adviser, when it is demanded that his client pay a deposit and yet submit to special conditions as to title; and he should endeavour, if he must give in to the demand, to yield only at the price of some substantial concession to himself, as that he shall have the right to rescind the contract and to have the deposit returned to him in case the vendor shall fail to show such a title according to the contract as a Court of Equity would oblige the purchaser to accept, or if the vendor shall for any other reason fail to prove his right to enforce as plaintiff the specific performance of the contract (*f*). And the purchaser should on no account agree to the payment of a deposit *to the vendor*, or to his solicitor *as his agent*, or otherwise than to some responsible person *as stakeholder* (*g*).

(*b*) *Re Banister, Broad* v. *Munton*, 12 Ch. D. 131, 145; *Lawrie* v. *Lees*, 14 Ch. D. 249; 7 App. Cas. 19.

(*c*) *Bennett* v. *Fowler*, 2 Beav. 302; Fry, Sp. Perf. § 1320, p. 590, 3rd ed.

(*d*) *Lewis* v. *Loxham*, 3 Mer. 429; *Malden* v. *Fyson*, 9 Beav. 347; Sug. V. & P. 646; 2 Dart, V. & P. 1129, 5th ed.; 1263, 6th ed.; 991, 7th ed. In such case the purchaser could not recover his own costs as damages at law; *Malden* v. *Fyson*, 11 Q. B. 292; *Keen* v. *Mear*, 1920, 2 Ch. 574, 582.

(*e*) *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Re Scott and Alvarez*, 1895, 2 Ch. 603; see above, p. 37; below, Chap. VI.

(*f*) See above, p. 82; Appendix (B), Condition 15, below.

(*g*) See above, pp. 28, 82.

Time for completion.

It is a matter of course to fix a day for completion. A time should be allowed within which it is reasonably likely that all things preliminary to completion will be done. Too often the day for completion appears to be fixed at hazard, or without any expectation that completion shall really then take place.

Fixtures or timber at a valuation.

It is of course as necessary to stipulate expressly, that fixtures or timber shall be taken at a valuation, on a private sale as on a sale by auction (*h*).

Commencement of title.

A purchaser should, as a rule, resist the insertion in a sale by private contract of any special stipulations limiting the vendor's obligations in respect of showing title, and should only accept such provisions on condition of concession in other matters to himself. Thus if it be proposed that the abstract commence with a deed less than forty years old, and that a deposit be paid, the purchaser should require the vendor to undertake expressly that the deed is a good root of title. This would, it is thought, save the purchaser from losing his deposit in circumstances such as those, which have just been discussed (*i*). And further concessions should certainly be demanded as the price of consent to any large curtailment of the time for which title is required to be shown by law; as that the vendor should bear the whole expense of verifying the abstract.

Limiting time for making requisitions or objections.

It is quite proper to provide in a private contract for sending in the purchaser's requisitions or objections within a limited time, to be of the essence of the contract (*j*). But the purchaser should take care that a reasonable time is allowed for perusal of the abstract by his counsel; and he should stipulate that the abstract shall be delivered within a specified time (*k*).

Reservation to vendor of right to rescind the contract.

It is usual to reserve to the vendor the right to rescind, if unable or unwilling to comply with some requisition, on which the purchaser insists (*l*). This is a stipulation which it is generally essential for the vendor to make. But as it is no part of an open contract and is entirely one-sided, the purchaser

(*h*) Above, p. 55.
(*i*) Above, pp. 82, 83.
(*j*) Above, p. 56.
(*k*) See above, p. 57.
(*l*) Davidson, Prec. Conv. vol. ii. pt. i. p. 4, 4th ed.; see above, p. 58.

ought to make its acceptance a ground of securing some advantage for himself (*m*). And if he admit it, he should stipulate that it be qualified by providing that the right of rescission shall only arise if the vendor have some reasonable ground, as the expense, for declining to comply with the requisition (*n*). He should also take care that the terms of the stipulation give him the alternative of withdrawing the unwelcome requisition (*o*).

Expense of verification of the abstract.

The purchaser ought to try to obtain some relaxation of his obligation to bear the expense of procuring and producing all evidence of title, which is not in the vendor's possession (*p*). He should ask, according to the vendor's eagerness to sell and the modifications of the contract proposed on the vendor's behalf, that the vendor shall bear either (1) the whole expense of verifying the abstract; or (2) such expenses of the production for verification of the abstract and the examination by the purchaser's solicitors of any documents, which the purchaser can require to be abstracted and which are in the possession of any other person than the vendor, as the vendor would be bound to pay if the said documents were in his own possession, but were produced elsewhere than at the proper place for their production (*p*); or (3) the like expenses as to documents which can be required to be abstracted and are in the possession of a mortgagee or other incumbrancer. The last of these stipulations ought to be proposed on the purchaser's behalf on every treaty for a private sale (*q*).

Evidence of identity.

The purchaser should object to any stipulation limiting his right to require evidence of identity (*r*), and should certainly not agree, without good reason shown, to any stipulation more stringent in this respect than the common form condition on sale by auction (*s*).

(*m*) See above, pp. 81, 82.

(*n*) See 1 Key & Elphinstone, Prec. Conv. 266, n. (*b*), 4th ed.; 281, n. (*h*), 10th ed.; above, p. 58, n. (*x*); and as to the construction of a stipulation so framed, *Re Weston and Thomas's Contract*, 1907, 1 Ch. 244, 248.

(*o*) See above, pp. 59, 65. (*p*) See above, pp. 33, 42, 43.

(*q*) See Appendix (B), Condition 5, below. Such a stipulation is contained in the common form conditions of sale by auction of the Bristol, Liverpool, and Newcastle-upon-Tyne Law Societies; and the Birmingham Law Society conditions are, as we have seen, even more favourable to the purchaser. Above, p. 68, n. (*h*).

(*r*) See Davidson, Prec. Conv. vol. ii. pt. i. pp. 4, 13-16, 4th ed.

(*s*) See above, pp. 33, 59, 66.

Compensation for errors of description.

As we have seen (*t*), an express stipulation, that compensation shall be paid for errors of description, is more favourable to the purchaser than the terms of an open contract: whilst a condition, that no compensation shall be made for such errors, appears more advantageous to the vendor. The stipulation fairest to both parties appears to be that providing for compensation to be allowed by the vendor or the purchaser, as the case shall require, and not restricting the right of compensation to errors discovered before the completion of the sale (*u*).

Conveyance.

A purchaser should certainly strike out of a draft contract any provision throwing upon him the expense of getting in any outstanding estate or perfecting the vendor's title, or of the concurrence in the conveyance of any necessary parties besides the vendor (*x*). In these respects he should stand out for the rights he would have under an open contract (*y*). This is only reasonable; and we have seen that, under the common form conditions of the Birmingham and other law societies, purchasers on sales by auction are not deprived of these rights (*z*).

Apportionment of rents and outgoings.

The same provision is made on a private sale for apportionment of the rents and outgoings as on a sale by auction (*a*).

Interest in case of delay in completion.

It is invariably asked that the purchaser shall expressly agree to pay interest on his purchase in case of delay in completion (*b*). But purchasers are advised to object to a stipulation binding them to pay interest on delay in completion arising "from any cause whatever" or "from any cause whatever other than the wilful default of the vendor" (*c*); not to agree to an excessive rate of interest; and to stipulate that, if delay in completion shall arise from the state of the title or any other cause except the purchaser's own fault, he may discharge himself of his liability to pay interest by duly appropriating his money to

(*t*) Above, p. 60.

(*u*) A condition of this kind is usually made on sales by order of the Court; 1 Davidson, Prec. Conv. 653, 663, 4th ed.; 587, 591, 5th ed.; R. S. C. 1883, App. L. No. 15, § 9; see above, pp. 60, 61.

(*x*) Above, pp. 61, 66.

(*y*) Above, p. 44.

(*z*) Above, p. 68, n. (*h*).

(*a*) Above, pp. 61, 67.

(*b*) Davidson, Prec. Conv. vol. ii. pt. i. p. 4, 4th ed.; 1 Key & Elphinstone, Prec. Conv. 259, 351, 4th ed.; 270, 271, 413, 10th ed.

(*c*) See above, pp. 61, 62.

the purchase (*d*). Such a stipulation is, as we have seen (*e*), contained in the common form conditions of sale by auction of the Birmingham, Bristol, Liverpool, and Manchester Law Societies.

A stipulation reserving to the vendor the right of re-sale on any breach of contract by the purchaser has appeared in well-known books of conveyancing precedents among the provisions usual in private sales (*f*). But there is certainly no settled practice to include such a condition in a private contract; and if it be inserted on the vendor's behalf, the purchaser's advisers are recommended to strike it out (*g*). If they are pressed to agree to its insertion, they should ask, as the condition of their consent, that its exercise shall be made subject to the reservation to the purchaser of the right to rescind the contract in case the vendor shall fail to show such a title according to the contract as a Court of Equity would oblige the purchaser to accept, or shall for any other reason fail to prove his right to enforce as plaintiff the specific performance of the contract (*h*). Re-sale.

A form of private contract for sale, with such stipulations in the purchaser's favour as he is above recommended to ask for (*i*), will be found in the Appendix (*k*).

(*d*) See below, Appendix (B), Condition 13.
(*e*) Above, p. 68, n. (*h*).
(*f*) Davidson, Prec. Conv. vol. ii. pt. i. p. 4, 4th ed.; 1 Key & Elphinstone, Prec. Conv. 268, 351, 4th ed.; 242, 319, 5th ed.; 256, 8th ed. In the 9th ed., however, of Key & Elphinstone's Precedents, pp. 376—382, the power of re-sale was omitted from the precedent of a private contract. And in the 10th ed., pp. 415, 416, a power of re-sale in case of the purchaser's default is inserted, but it is made exercisable only on condition that the vendor has shown such a title according to the contract as the purchaser would be compelled to accept; and the forfeiture of the deposit in case of the purchaser's default is made subject to the same condition; and it is provided that if the vendor fail to perform this condition, the purchaser shall be at liberty to rescind the contract and his deposit shall be returned to him.
(*g*) See Davidson's Concise Precedents, 118, n. (*a*), 19th ed.
(*h*) See above, pp. 82, 83; and Appendix (B), Condition 15, below.
(*i*) Above, pp. 80 *sq.*
(*k*) See Appendix (B), below.

CHAPTER IV.

OF THE VENDOR'S OBLIGATION TO SHOW A GOOD TITLE AND ITS DISCHARGE.

§ 1. Of the general nature of the proof required.
§ 2. Of the abstract.
§ 3. Of the verification of the abstract.

§ 1.—*Of the vendor's obligation to show a good title and its discharge.*

Origin of the rule, that the vendor must show a good title.

We have seen (*a*) that every vendor of land is bound to show a good title to the property sold by him. This rule would appear to be of equitable origin. The Courts of Equity, in granting to a vendor the extraordinary relief of enforcing specific performance of the contract, considered that it was only fair to impose the condition, that he on his side should prove that he could actually convey what he professed to sell (*b*). And the obligation so established in equity was afterwards held to be equally incident to the contract at law (*c*). What the vendor has to prove, in order to fulfil this obligation, is that he can convey that which he contracted to sell; that is to say, if he engaged to sell a freehold or copyhold in fee (*d*), the fee simple free from incumbrances, or if the property sold were leasehold, then the term for which he described it as held. But the nature and extent of the proof required was defined by a

(*a*) Ante, p. 31.

(*b*) *Jenkins* v. *Hiles*, 6 Ves. 646, 653; *White* v. *Foljambe*, 11 Ves. 337; *Deverell* v. *Bolton*, 18 Ves. 508; *Fildes* v. *Hooker*, 2 Mer. 424; *Purvis* v. *Rayer*, 9 Price, 488, 518, 519.

(*c*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Souter* v. *Drake*, 5 B. & Ad. 992; *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695, 701. This rule had no place in the mediæval common law, when feoffees looked mainly to their feoffors' warranty for their security; see Wms. Real Prop. 444-6, 13th ed.; 647, 648, 23rd ed.

(*d*) As we have seen, a contract to sell a piece of land, without specifying what estate therein is to be conveyed, is construed as a contract to sell the whole estate therein, that is, in the absence of any limiting expressions, the unincumbered freehold in fee; above, p. 39.

Proof of sixty years' title *primâ facie* proof of a good title.

general rule of equity and law, adopted from the practice of conveyancers, whereby proof of title for not less than sixty years before the contract was held to be proof of a good title, if nothing appeared to the contrary (*e*). It is important to bear in mind, however, that this was merely a subordinate rule limiting the amount of evidence which the purchaser could require. It simply bound the purchaser to accept, as proof of a good title, evidence of sixty years' ownership ending in the vendor or in some person or persons whom the vendor would have the right to direct to convey; provided, however, that nothing appeared to show that the ownership so proved was not full or complete (*f*). But it was of no avail to show sixty years' title, if the result of the evidence produced were not to discharge the vendor's main obligation, that is, that he could actually convey what he sold (*g*). Thus on the sale of a freehold in fee, if it were proved that the vendor and his predecessors had had possession and exercised acts of ownership for sixty years back, that would no doubt be *primâ facie* evidence of a seisin in fee, and the purchaser would be bound to accept the title (*h*). But supposing it appeared from the vendor's evidence, or the purchaser could prove from other sources that such possession and ownership were enjoyed under a demise for a long term of years, it is obvious that the evidence of sixty years' title would not prove that the vendor could convey the fee simple which he sold. The purchaser therefore could require further evidence of the vendor's title to the fee simple, and if this were not forthcoming, would have the right to rescind the contract. It seems worth while to insist on this apparently simple distinction between the main rule imposing the duty of showing a good title, that is, a title to convey what was sold (*i*), and the subordinate rule defining the manner of proof. As a matter of fact, omission to remember this distinction has been a fruitful source of error, especially in cases where *the time* for which title can be required to be shown has been limited

(*e*) *Barnwell* v. *Harris,* 1 Taunt. 430, 432; *Cooper* v. *Emery,* 1 Ph. 388; *Hodgkinson* v. *Cooper,* 9 Beav. 304; *Moulton* v. *Edmonds,* 1 De G., F. & J. 246; Sug. V. & P. 365, 407.

(*f*) See note to *Parr* v. *Lovegrove,* 4 Drew. 183.

(*g*) See Sug. V. & P. 366; *Frend* v. *Buckley,* L. R. 5 Q. B. 213.

(*h*) See *Prosser* v. *Watts,* 6 Madd. 59; *Cottrell* v. *Watkins,* 1 Beav. 361, 365, 366; *Parr* v. *Lovegrove,* 4 Drew. 170, 177, 178; *Moulton* v. *Edmonds,* 1 De G., F. & J. 246.

(*i*) *Lawrie* v. *Lees,* 7 App. Cas. 19.

by special stipulation. In some such cases, the vendors, or their advisers, would appear to have forgotten that such a stipulation merely limits the evidence of title that can be asked of them in the first instance, and does not exempt them from the general duty of proving that they have the right to convey what they have sold (*k*).

Sixty years' title had to be shown, as a rule, in all cases.

A good title then is shown by proving such ownership as is promised by the contract; and the evidence required is evidence of the exercise of acts of ownership for a period of time which, in the absence of special stipulation, was fixed at not less than sixty years. The rule requiring evidence of sixty years' ownership in proof of title applied equally to a sale of freeholds, whether of inheritance or for lives, copyholds and leaseholds for years (*l*). In the case of leaseholds, if the lease were less than sixty years old, the vendor might be required to show the title to the freehold for such a period as, with the time expired since the grant of the lease, would make up sixty years (*m*).

When earlier title could be required.

There were, however, certain cases in which the purchaser could call for earlier title than that of the last sixty years. These were the following:—

1. Advowson. (1.) Not less than one hundred years' title must have been shown to an advowson (*n*).

2. Long term. (2.) Upon a sale of a long term of years, the lease must have been produced, although more than sixty years old. But after the date of the lease the title during the sixty years next before the date of the contract for sale was all that could be required (*o*).

(*k*) See *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 15 Q. B. D. 261, 271; 16 Q. B. D. 778; *Re Cox and Neve's Contract*, 1891, 2 Ch. 109.

(*l*) *Barnwell* v. *Harris*, 1 Taunt. 430; *Cooper* v. *Emery*, 1 Ph. 388; *Hodgkinson* v. *Cooper*, 9 Beav. 304; *Moulton* v. *Edmonds*, 1 De G., F. & J. 246; Sug. V. & P. 365, 407.

Contract to grant a lease.

(*m*) *Purvis* v. *Rayer*, 9 Price, 488; *Souter* v. *Drake*, 5 B. & Ad. 992. The rule also applied to a contract to grant a lease, whether for lives or years, such a contract being regarded as equivalent to a sale for the time the lease was to run; *Roper* v. *Coombes*, 6 B. & C. 534; Sug. V. & P. 367, n. (1); *Stranks* v. *St. John*, L. R. 2 C. P. 376; see below, p. 94.

(*n*) Sug. V. & P. 367; 1 Dart, V. & P. 293, 5th ed.; 334, 6th ed.; 329, 7th ed.; Wms. Real Property, 449, 13th ed.; 651, 23rd ed.

(*o*) Sug. V. & P. 370; *Frend* v. *Buckley*, L. R. 5 Q. B. 213; 1 Dart, V. & P. 294, 5th ed.; 335, 6th ed.; 330, 7th ed.; Wms. Real Prop. 450, 13th ed.; 651, 23rd ed.

(3.) Upon a sale of tithes or other property held under a grant from the Crown, the original grant must have been shown, although more than sixty years old. After the date of the grant, only sixty years' title prior to the contract need have been shown. The intermediate title could not be required (*p*). 3. Tithes or property held by Crown grant.

(4.) Upon the sale of a reversionary interest, its creation must have been shown, whatever its antiquity (*q*). 4. Reversionary interest.

All these instances do but illustrate the point on which we have been insisting, that the vendor's obligation is to show that he has the right to convey what he sold, and unless the evidence offered in support of the title prove this, it is insufficient, though it were evidence of sixty years' ownership. The case of a sale of leaseholds is particularly instructive. On the ground that a purchaser of leaseholds was entitled equally with a purchaser of freeholds to the assurance that he should have the very thing he bought, it was held that the vendor was bound to produce the freeholder's title to grant the lease, if the lease were less than sixty years old (*r*). But if the lease had been granted more than sixty years before the sale, proof of sixty years' enjoyment under the lease would establish the presumption that it had been well granted, and in such case the freeholder's title could not be called for; although the lease itself must have been produced, in order to prove that the vendor could assign the very interest which he had sold (*s*). The other cases will be found to depend on similar principles.

The law being as above stated, it was enacted in the Vendor and Purchaser Act, 1874 (*t*), as follows:—In the completion of any contract of sale of land (*u*) made after the 31st day of December, 1874, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period Vendor and Purchaser Act, 1874. Forty years' title only now required.

(*p*) *Pickering* v. *Lord Sherborne,* 1 Craw. & Dix, 254; 1 Prest. Abst. 30, 2nd ed.; 1 Jarm. Conv. by Sweet, 68; Sug. V. & P. 367; 1 Dart, V. & P. 295, 5th ed.; 336, 6th ed.; 331, 7th ed.

(*q*) 1 Prest. Abst. 19, 2nd ed.; 1 Jarm. Conv. by Sweet, 61; 1 Dart, V. & P. 294, 5th ed.; 335, 6th ed.; 329, 330, 7th ed.

(*r*) See cases cited ante, p. 90, n. (*m*).

(*s*) Ante, p. 90.

(*t*) Stat. 37 & 38 Vict. c. 78, s. 1.

(*u*) By the Interpretation Act, 1889 (stat. 52 & 53 Vict. c. 63, s. 3, replacing 13 & 14 Vict. c. 21, s. 4), in every Act passed after the year 1850 the expression "land" shall, unless the contrary intention appears, include messuages, tenements, hereditaments, houses and buildings of any tenure.

of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required. This enactment in no way detracts from the main rule that the vendor must show a good title; it merely reduces the time, for which title must, as a rule, be proved, from sixty to forty years. By the same Act (*x*), the purchaser of a term of years was deprived of the right to call for the title to the freehold, in the absence of stipulation to the contrary; and by the Conveyancing Act, 1881 (*y*), the purchaser of a term granted by underlease was deprived of the right (unless expressly reserved) to call for the title to the leasehold reversion. The latter Act also took away from the purchaser of land, once of copyhold or customary tenure but converted into freehold by enfranchisement, the right (except by express agreement) to call for the title to make the enfranchisement (*z*). We have seen that a purchaser of leaseholds was entitled to call for the production of the lessor's title on the ground that the validity of a lease depends on the lessor's power to grant it (*a*). And where enfranchisement has been effected by the lord's conveyance of the freehold to the tenant, it is obviously material to prove the title to make the enfranchisement in order to establish a good right to the land (*b*). But before the above-mentioned enactments were passed purchasers frequently submitted in practice to special stipulations of the like nature (*c*), which seems to be the reason why these statutory provisions were made.

Title on purchase of leaseholds for years—

of enfranchised copyholds.

The present law.

The present law therefore is this:—The vendor is bound to show a good title, that is, he must prove that he has the right to convey what he sold. In some exceptional cases he may be

(*x*) Stat. 37 & 38 Vict. c. 78, s. 2, r. 1.
(*y*) Stat. 44 & 45 Vict. c. 41, s. 3 (1, 9).
(*z*) Sect. 3 (2, 9).
(*a*) Ante, p. 91.

Enfranchisement under the Copyhold Acts.

(*b*) Sug. V. & P. 372; 1 Dart, V. & P. 289, 5th ed. Enfranchisement under the Copyhold Acts, 1841, 1852, or 1894, makes the land freehold, irrespectively of the validity of the lord's title; which is therefore immaterial and cannot be inquired into on a sale of the land after such enfranchisement; see stat. 4 & 5 Vict. c. 35, s. 64; *Kerr* v. *Pawson,* 25 Beav. 394; 1 Dart, V. & P. 166, 290, 5th ed.; 189, 330, 6th ed.; 183. 326, 7th ed.; stat. 57 & 58 Vict. c. 46, ss. 21, 26 (3, 4), 38, 61.

(*c*) 1 Dav. Prec. Conv. 531, 623, n. (*y*), 4th ed.; 1 Dart, V. & P. 166-8, 5th ed.; Wms. Real Prop. 452, 13th ed.

able to offer summary and complete proof of this, as where a title, good against all the world, is vested in him by Act of Parliament (*d*). But, as a rule, he will have no alternative but to give evidence of the ownership of himself and his predecessors for a certain time back. This time, in the absence of special stipulation, must not be less than forty years, but this general rule is modified by the considerations and enactments already stated (*e*). A purchaser under an open contract is therefore entitled to call for the title mentioned below in the following cases of sale:—

1. Of freeholds of inheritance or for lives, or copyholds, title for forty years next before the contract (*f*). In the case of freeholds for lives, the lease for the lives must be produced, though more than forty years old. 1. Freeholds or copyholds.

2. Of freeholds, formerly copyhold but enfranchised within forty years of the sale, the freehold title back to and including the enfranchisement, and beyond that the copyhold title back to forty years before the contract (*g*), but not the title to make the enfranchisement (*h*). 2. Enfranchised copyholds.

3. Of leaseholds for years, production of the lease under which the property is held in all cases; and, if the lease be more than forty years old, the title under the lease for the forty years next before the contract, otherwise the whole title subsequent to the lease: but not in any case the title to the freehold, nor, in the case of the sale of property held by underlease (*i*), the 3. Leaseholds for years.

(*d*) This might be by special Act of Parliament, and appears to be the case with persons registered as owners with an indefeasible title under the Land Registry Act, 1862 (stat. 25 & 26 Vict. c. 53, s. 20), or with an absolute title under the Land Transfer Act, 1875 (stat. 38 & 39 Vict. c. 87, s. 7); see 1 Dart, V. & P. 305, 306, 5th ed.; 347, 6th ed.; 342, 7th ed.; Land Transfer Act, 1897 (stat. 60 & 61 Vict. c. 65, s. 16); below, Chap. XX.

(*e*) Ante, pp. 89-92.

(*f*) Ante, pp. 89, 91, 92.

(*g*) Sug. V. & P. 372; 1 Dart, V. & P. 289, 5th ed.

(*h*) Ante, p. 92, and n. (*b*).

(*i*) Ante, pp. 90, 92. Here it may be noted that, on the sale of a term granted by an underlease, the property must be described as held by *underlease*. For if property sold be described as held by lease, that is intended to mean a lease from the freeholder, so that if the vendor be possessed only of a term granted by underlease, he is not in a position to fulfil the contract; *Re Beyfus and Masters's Contract*, 39 Ch. D. 110; see above, p. 76. It is thought that this rule is not impugned by the case of *Re Lloyd's Bank, Ltd. and Lillington's Contract*, 1912, 1 Ch. 601, in which a "leasehold house" was sold, and the judge gave no decision on the purchaser's objection that the property was held by underlease, but held that the purchaser could refuse the title on another ground; see below, Chap. X. § 2. Property held by underlease must be so described.

Contract to grant a lease for years.

title to any leasehold reversion (*k*). Here we may remark that the same law applies on a contract to grant a lease for years (*l*), the intended lessee being precluded, in the absence of stipulation to the contrary, by the Vendor and Purchaser Act, 1874 (*m*), from calling for the title to the freehold, and by the Conveyancing Act, 1881 (*n*), from calling for the title to any leasehold reversion to the intending lessor's interest. But on a contract to grant an underlease, the intending lessor still remains liable to produce the lease under which he holds, and to show the subsequent title thereunder, if it be less than forty years old, otherwise the last forty years' title thereunder.

Contract to grant an underlease.

4. Advowson.

4. Of an advowson, title for at least one hundred years before the contract (*o*).

5. Tithes, or property held by Crown grant.

5. Of tithes or other property held under a grant from the Crown, production of the original grant in all cases, and title thereunder for the forty years next before the contract (*p*).

6. Reversionary interest.

6. Of a reversionary interest, production of the instrument which created it, in all cases; and in addition proof that possession of the land has been in accordance with the instrument so produced (*q*). If the reversionary interest were created less than forty years before the contract, of course the whole title subsequent to its creation must be shown. In other cases it would appear to depend on the nature of the interest sold what title ought to be shown subsequently to its creation. If the property sold were a reversion or remainder to which any rent is incident, then the purchaser could call for production of the last forty years' title, but not the intermediate title. For in such a case there is a perception of tangible profits by receipt of rent, and this affords evidence of title as against not only the rent-payer but others as well. If however what was sold were a bare right, the apparent devolution thereof to particular persons for the last forty years can raise no presumption of the establishment of a right superior to the claims of others. In this case therefore there seems to be no good reason for putting

(*k*) *Gosling* v. *Woolf*, 1893, 1 Q. B. 39.
(*l*) Above, p. 90, n. (*m*).
(*m*) Stat. 37 & 38 Vict. c. 78, s. 2, r. 1; *Jones* v. *Watts*, 43 Ch. D. 574.
(*n*) Stat. 44 & 45 Vict. c. 41, s. 13.
(*o*) 1 Dart, V. & P. 293, 5th ed.; 334, 6th ed.; 329, 7th ed.; Wms. Real Prop. 451, 13th ed.; 651, 23rd ed.
(*p*) 1 Dart, V. & P. 295, 5th ed.; 336, 6th ed.; 331, 7th ed.
(*q*) 1 Jarm. Conv. 3rd ed. by Sweet, 61, 62; 1 Dart, V. & P. 294, 5th ed.; 335, 6th ed.; 329, 330, 7th ed.

any time-limit to the required proof that the vendor has the right to convey what he sold; and it is thought that the whole title, from the creation of the reversionary interest to the contract for sale, can be called for.

The best and the usual evidence of title is production of the title-deeds.

At the present time then, the vendor, in order to show a good title to the property sold, has, as a rule, to give evidence of the last forty years' ownership thereof, and to make out that such ownership ends either in himself or in some person or persons whom he is entitled, either unconditionally or upon certain conditions of which the performance rests with himself alone (such as the payment off of mortgages), to direct to convey. Now, as some of the best evidence of ownership is proof of the power of disposition incident to ownership, especially for valuable consideration (*r*), and as proof that the vendor has the right to convey what he sold must necessarily be made out by showing the devolution of the ownership of the land, it usually happens that the main evidence offered in support of the vendor's title is the deeds, by which the land sold has been conveyed on former sales or mortgages thereof, and any will, by which the land may have been devised. Thus the chief evidence of title given on sales is almost entirely documentary. This results of course from the fact that ever since the end of the mediæval period of law, the usual method of making a conveyance of land has been by the execution of deeds or a deed (*s*). If then, on the sale of a freehold in fee, the vendor produce the title-deeds for the last forty years, and these show that the fee simple in the land sold has been conveyed to him, free from incumbrances, and if there be satisfactory evidence that the deeds produced relate to the land sold, and the vendor be in possession of the land and of the deeds, he has shown a good title to the land.

Other evidence of title.

But although title deeds are the most common, and, owing to the long prevailing custom of conveyance by deed, the best evidence of title, it must not be supposed that they are the only evidence which the purchaser is bound to accept. This will appear clearly if we bear in mind our main rule, that what the vendor has to show is that he has the right to convey what he sold, and our subordinate rule, that, if nothing appear to the contrary, this shall be taken to be shown on proof of forty years' ownership,

(*r*) See Burt. Comp. pl. 418-427.
(*s*) See Wms. Real Prop. 153, 211 *sq.*, 23rd ed.

that is, in the case of freeholds, forty years' seisin in fee, ending in the vendor. Now forty years' seisin in fee may be proved without deed; as by evidence of the seisin of some ancestor of the vendor forty years ago, and of devolution of the title to the vendor by descent. And if the facts of possession and kinship, on which such a title must depend, were fully proved, the purchaser would be bound to accept it (*t*). But to illustrate the above rules further, it may be observed that the vendor of a freehold in fee would scarcely discharge his obligation to show a good title by simply proving that he himself had been in possession of the land sold for forty years. For although the rule applicable in actions for the recovery of land is that possession is *primâ facie* evidence of a seisin in fee (*u*), it is considered that, on sales, the purchaser is entitled to better proof, that the vendor has the right to convey what he sold, than is afforded by facts equally consistent with his being entitled for life or years only as with his having the entire fee in simple (*x*). In such a case therefore it is thought that the purchaser could require the vendor to show the origin of his possession, and to establish that he entered as tenant in fee, for instance, under a conveyance on sale to him, or as heir, or upon a wrongful entry (*y*).

Title depending on Statute of Limitations.

Here it may be noticed that the Court will compel a purchaser to take a title depending on the Statute of Limitations, that is to say, depending on the extinguishment under that Statute (*z*) of the right and title of some person or persons who are shown to have been rightfully entitled (*a*). But it must not be supposed that this doctrine enables a vendor, who has been in possession for twelve or even thirty years to escape the common obligation of showing forty years' title as proof of a good title. Possession for these periods does not give a good title under

(*t*) *Cottrell* v. *Watkins,* 1 Beav. 361, 365, 366; *Dorling* v. *Claydon,* 1 H. & M. 402; Sug. V. & P. 410, 421; 2 Prest. Abst. 23, 2nd ed.; 1 Dart, V. & P. 298, 336, 5th ed.; 340, 380, 381, 6th ed.; 334, 376, 377, 7th ed.

(*u*) *Doe* d. *Hall* v. *Penfold,* 8 C. & P. 536; Cole on Ejectment, 211.

(*x*) See *Hiern* v. *Mill,* 13 Ves. 114, 122; *Eyton* v. *Dicken,* 4 Pri. 303; *Cottrell* v. *Watkins,* 1 Beav. 361, 365, 336; Sug. V. & P. 461; 1 Dart, V. & P. 334, 5th ed.; 379, 6th ed.; 372, 373, 7th ed.

(*y*) See Co. Litt. 189 b, and n. (7); *Leach* v. *Jay,* 9 Ch. D. 44.

(*z*) Stat. 3 & 4 Will. IV. c. 27, s. 34.

(*a*) *Scott* v. *Nixon,* 3 Dru. & War. 388; *Sands* to *Thompson,* 22 Ch. D. 614; *Games* v. *Bonnor,* 54 L. J. Ch. 517; 33 W. R. 64; *Re Atkinson and Horsell's Contract,* 1912, 1 Ch. 2, 2 Ch. 1.

the Statute as against all the world; it does not bar the rights of remaindermen or reversioners not entitled to possession until the determination of some particular estate (*b*). It does not appear therefore that a vendor's obligation of showing a good title can be discharged by proof of thirty or even forty years' possession by himself alone, without showing, if the Statute of Limitations be relied on, who were rightfully entitled and that the vendor's possession has effectually barred their claims (*c*).

Vendor must produce the title-deeds, if he can.

A good title then may be shown without deed. But the deeds are the best evidence of title; and if the land sold has been conveyed by deed within the period for which title has to be shown, it is not open to the vendor to prove forty years' seisin in fee by other means. He must produce the deeds, or if they be lost or destroyed, give proper secondary evidence of their contents (*d*).

§ 2. *Of the Abstract of Title.*

Vendor bound to make and deliver an abstract of title.

Evidence of title on sales being for the most part documentary (*e*), and such as can be weighed only by skilled legal advisers, it became usual to facilitate the task of judging of the effect of the title-deeds by making an abstract of their contents for the perusal of the purchaser's counsel. It appears that formerly the deeds were handed over to the purchaser for examination, and any abstract of them which he might require was made at his expense. But afterwards it became established that the vendor was bound to make at his own expense and deliver to the purchaser an abstract of the title to the property sold (*f*); and so the law still remains (*g*).

(*b*) Stat. 37 & 38 Vict. c. 57, ss. 1-5; *Pedder* v. *Hunt*, 18 Q. B. D. 565; *Re Earl of Devon's Settled Estates*, 1896, 2 Ch. 562.

(*c*) *Jacobs* v. *Revell*, 1900, 2 Ch. 858; Farwell, J., *Re Nisbet and Potts' Contract*, 1905, 1 Ch. 391, 401, affirmed, 1906, 1 Ch. 386 (it is respectfully submitted that the *dictum* here cited is unexceptionable: but the decision in this case is criticised by the writer in 51 Sol. J. 141, 155); *Re Atkinson and Horsell's Contract*, 1912, 1 Ch. 2, 8; 2 Ch. 1, 11, 19.

(*d*) *Bryant* v. *Busk*, 4 Russ. 1; *Moulton* v. *Edmonds*, 1 De G., F. & J. 246.

(*e*) Ante, p. 95.

(*f*) Sug. V. & P. 406.

(*g*) It has not been altered by sect. 3 (6) of the Conveyancing Act, 1881; *Re Johnson and Tustin*, 30 Ch. D. 42.

What the abstract ought to contain.

Speaking generally, the abstract of title ought to contain a statement of the material parts of every deed, will or other instrument, by which any disposition of the property was made during the time for which title has to be shown; it ought also to contain a statement of every birth, death, marriage, bankruptcy or other event material to the devolution during the same period of the estate contracted to be sold (*h*). If the earliest piece of evidence stated on the abstract be an instrument of disposition, and this be offered in unsupported proof of the commencement of the vendor's title, it must be what is called a good root of title; that is to say, it must be an instrument of disposition dealing with or proving on the face of it (without the aid of extrinsic evidence) the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified, and showing nothing to cast any doubt on the title of the disposing parties. If the instrument be deficient in any of these particulars, the purchaser may require further evidence to supply the deficiency (*i*). For example, if the abstract commence with a will containing a general devise of the testator's real estate, under which the property sold is alleged to have passed, the purchaser will be entitled to require evidence of the testator's seisin (*k*). And if the first abstracted deed be a conveyance of an equity of redemption, that is, of land subject to a mortgage either in fee or for a term of years, it is thought that the purchaser is entitled to require the mortgage deed (however old) to be abstracted and produced (*l*). But a conveyance in fee on a sale or by way of mortgage is a good root of title. So a transfer of a mortgage in fee appears to be a good root of title, where it is made with the concurrence of all parties interested in the equity of redemption, and a new equity of redemption is reserved. But unless a new equity of redemption be reserved, a transfer of a mortgage

The abstract should commence with a good root of title.

General devise.

Conveyance of an equity of redemption.

Transfer of mortgage.

(*h*) Sug. V. & P. 405 *sq.*; 1 Dart, V. & P. 279 *sq.*, 5th ed.; 319 *sq.*, 6th ed.; 315 *sq.*, 7th ed.; *Re Wallis & Grout's Contract*, 1906, 2 Ch. 206; *Re Conlon & Faulkener's Contract*, 1916, 1 I. R. 241; *Re Wright & Thompson's Contract*, 1920, 1 Ch. 191, 195.

(*i*) 1 Dart, V. & P. 295 *sq.*, 5th ed.; 337 *sq.*, 6th ed.; 331 *sq.*, 7th ed.; *Re Cox & Neve's Contract*, 1891, 2 Ch. 109, 118.

(*k*) *Parr* v. *Lovegrove*, 4 Drew. 170.

(*l*) This follows from the principles laid down in *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *Re Cox & Neve's Contract*, 1891, 2 Ch. 109, 117, 118.

appears to be no more a good root of title than a conveyance of the equity of redemption is (*m*).

Reason of the rule requiring a good root of title.

The necessity for a good root of title is explained by referring to the rule that a good title is shown by proof of forty years' title. This means forty years' title to the whole estate sold; so that if the fee be sold, what the vendor has to prove is forty years' seisin in fee. He must therefore begin by proving a seisin in fee by himself or his predecessor of the property sold forty years before the contract, and end by showing a like seisin at the present time in himself or some person whose conveyance of the property he has a right to procure (*n*). It is accordingly equally incumbent on him to produce good evidence of the possession of the whole estate contracted for at the time of the commencement of title as to show that this estate is now his to convey. This is the reason why further evidence may be required by the purchaser, if the first document on the abstract be insufficient of itself to prove the ownership of the whole estate. Considered with regard to this principle, the conveyance of an equity of redemption (*o*) and a lease of years, even though it be a demise by way of mortgage for a long term, obviously fall short of the requirements of a good root of title.

Conveyance of equity of redemption.

Deed exercising a power.

So a deed appointing an estate under a power of appointment is not of itself a good root of title; since to have a power of appointment over an estate is not the same as to be the owner of it, and what a vendor has to prove is the full ownership, at the time of commencement of title, of the estate he is selling. For evidence of such ownership he must go back to the deed, which created the power (*p*). On the same principle, a dis-

(*m*) See above, pp. 70, 71, as to the special conditions of sale necessary when it is desired that the title shall commence with a deed, which is not a good root of title.

(*n*) Ante, p. 95; and consider the cases cited above, p. 98, notes (*h*), (*i*).

(*o*) Above, p. 98.

(*p*) 1 Prest. Abst. 5, 6, 2nd ed.; 1 Jarm. Conv. 3rd ed. by Sweet, 67; 1 Dart, V. & P. 297, 5th ed.; 339, 6th ed.; 333, 7th ed. By the Conveyancing Act, 1881 (stat. 44 & 45 Vict. c. 41, s. 3 (3)), a purchaser of any property shall not require the production or any abstract or copy of any document dated or made before the time prescribed by law or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser. But as, by sect. 3 (11), this provision is to be treated, for the purpose of the specific performance of the contract, like an express stipulation to the same effect, it follows, according to the principle laid down in *Re Marsh*

Disentailing assurance.

entailing assurance is not a good root of title; as it only shows the ownership of an estate tail at the time of commencement of title, and this, like a power of appointment, is merely a derivative interest and not full ownership, which is fee simple. In such cases, the deed creating the estate tail should be abstracted (*q*).

Whether the abstract must commence with a conveyance for valuable consideration.

It is of course advisable for a vendor to commence his abstract with a conveyance for valuable consideration, as that affords the strongest evidence of ownership, not only because it shows that someone was willing to give money for the property, but also on account of the presumption that on a sale or mortgage the prior title was investigated in the usual way and was approved. It does not appear however that a purchaser can object to an instrument of disposition forty years old as a root of title on the ground that the disposition was not made for valuable consideration or was made on an occasion on which it is not usual to investigate the title. Thus it seems that a voluntary conveyance (*r*), or a family settlement would be an unobjectionable root of title, if made by deed forty years old, and that a will containing a specific devise would be a sufficient root of title, if the testator died at least forty years before the sale; although in such cases the most prudent course for the vendor would undoubtedly be to specify in the contract or conditions of sale the nature of the instrument with which the title was to commence. But if the vendor make a special stipulation limiting the time for which title shall be shown to a shorter period than is given by law, different considerations apply. Such a stipulation must be fair and explicit, or the vendor, in seeking specific performance, will not be allowed to insist on it. If, therefore, a stipulation be made that the title shall commence with a particular deed less than forty years old, the purchaser is entitled to assume that the

Voluntary conveyance; family settlement.

Specific devise.

Root of title where the time for showing title is curtailed by special stipulation.

and Earl Granville, 24 Ch. D. 11, that, unless a vendor fairly and explicitly stipulates that the abstract shall commence with a deed exercising a power, he cannot take advantage of this enactment in enforcing specific performance against the purchaser; see above, pp. 70, 71.

(*q*) 1 Prest. Abst. 5-7; Sug. V. & P. 366; 1 Dart, V. & P. 297, 5th ed.; 339, 6th ed.; 333, 7th ed.; see above, p. 71.

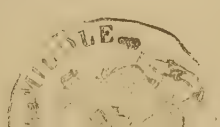
(*r*) Cotton, L. J., *Re Marsh and Earl Granville*, 24 Ch. D. 11, 24. The contrary is stated by the editors of Dart, 1 V. & P. 339, 6th ed.; 333, 7th ed., relying on the decision in the above case: but it is submitted that this decision goes no further than is stated below, and has no application, where the purchaser's rights are not curtailed by special stipulation.

deed was made on an occasion on which the title would be investigated; and should this not be the case, as if the deed were voluntary, the vendor cannot force him, in an action for specific performance, to accept the title as limited by the condition (*s*). Such conditions, to be effectual as regards the specific performance of the contract, must state clearly the nature of the instrument, with which the title is to commence (*t*).

What documents should be abstracted after the root of title.

After the document forming the root or commencement of title, there should be abstracted every subsequent document, whether deed or will, which deals with the legal estate in the property sold, except expired leases (*u*); and all facts whereon the title depends, such as births, marriages, deaths or bankruptcies, should be stated in their proper order. With regard to documents affecting the equitable but not the legal estate in the property sold, if they be documents on which the purchaser's title will necessarily depend, they certainly ought to be placed on the abstract (*x*). But as a purchaser for value, who takes a conveyance of the legal estate in any property, is not bound by any equitable interests therein, of which he has no notice, it is obvious that there may be many documents creating equitable interests only which are not necessary to the purchaser's title, so long as he obtains the legal estate without notice of them. For instance, the vendor may be possessed of documents showing that some former owner who appeared on the face of a conveyance to be entitled for his own benefit, was in fact a trustee, or that persons who had advanced money on mortgage were trustees of the mortgage money. In such cases it would be unusual to allow notice of the trust to appear on the abstract (*y*). This, Mr. Dart points out, is no doubt a departure from the general principle that it is for the purchaser's solicitor, and not the vendor's, to judge of the materiality of the muniments of title; but it is sanctioned by convenience and universal practice (*z*).

(*s*) *Re Marsh and Earl Granville*, 24 Ch. D. 11.
(*t*) See above, pp. 70, 71.
(*u*) And except as mentioned above, pp. 93, 94; 1 Dart, V. & P. 299, 5th ed.; 340, 6th ed.; 335, 7th ed.; and consider *Whiting to Loomes*, 14 Ch. D. 822; 17 Ch. D. 10; *Re Wallis & Grout's Contract*, 1906, 2 Ch. 206; *Bond* v. *Basset*, 1917, W. N. 278, 117 L. T. 551.
(*x*) 1 Dart, V. & P. 299, 5th ed.; 341, 6th ed.; 335, 7th ed.
(*y*) 1 Dart, V. & P. 299, 300, 5th ed.; 341, 342, 6th ed.; 335, 336, 7th ed.
(*z*) See *Re Harman and Uxbridge, &c. Ry. Co.*, 24 Ch. D. 720; *Re Chafer & Randall's Contract*, 1916, 2 Ch. 8, 12, 13, 19, 24, 25; below, Chap. VIII. § 1.



Again, if a charge should have been created on the property by a document which could only create an equitable interest therein, and the charge should afterwards have been paid off, it is not the practice to let these facts appear on the abstract (*a*). This is contrary to the rule laid down by Wood, V.-C., in *Drummond* v. *Tracy* (*b*), who stated that he had no doubt that such charges ought to be communicated to the purchaser. It was observed however by Mr. Dart (*a*), that the strict rule so laid down may be theoretically correct: but its practical inconvenience, as much to purchasers as vendors, is so great, that in practice it had previously been all but universally ignored: nor has the practice, it is believed, been materially, if at all, affected by that decision.

The general rule then as to what documents ought to be abstracted is that laid down by Lord St. Leonards (*d*):—"The solicitor should abstract every document upon which the title depends, or upon which any difficulty has arisen. Wherever he begins the root of title, he ought to abstract *every* subsequent deed." This general rule is however qualified, as we have seen, by the practice of not disclosing trusts such as the trusts of money advanced by trustees on mortgage, or of purchases where the trustee appears on the face of the conveyance to be entitled for his own benefit; and by the practice of not abstracting merely equitable charges which have been paid off. There is a difference however between equitable charges which may and those which cannot affect the legal estate. A mortgage of an equity of redemption, or second mortgage, made by deed, with a proviso for redemption in the same form as a legal mortgage, could operate to convey the legal estate if it should not have passed by the prior mortgage. Such a charge, Mr. Dart pointed out (*e*), should rarely or never be suppressed. Equitable charges created by a mere memorandum in writing or by deposit of title-deeds stand on a different footing; for without a deed the legal estate in lands cannot be affected by such charges. In spite of the rule to the contrary laid down in *Drummond* v. *Tracy* (*f*), it is the practice to make no mention

(*a*) 1 Dart, V. & P. 301, 5th ed.; 343, 6th ed.; 337, 7th ed.
(*b*) John. 608, 612.
(*d*) Sug. V. & P. 407.
(*e*) 1 Dart, V. & P. 300, 5th ed.; 342, 6th ed.; 336, 7th ed.
(*f*) John. 608.

of such charges in the abstract after they have been paid off; nor are they generally disclosed, even when still subsisting (*g*).

The manner of making an abstract.

Some few words should be said about the manner in which deeds or other documents should be abstracted. At the present day, the work of making an abstract of title is often so indifferently performed that it seems necessary to point out that the vendor is bound to furnish such an abstract of the contents of the deeds as shall enable the purchaser's counsel to judge of their effect. The purchaser cannot therefore be required to accept as a proper abstract any mere statement of the effect of any operative clause, which is material to the title; he is entitled to be informed of the exact words used in every material part of any document abstracted. For the whole object of requiring an abstract of title is to enable the purchaser's conveyancing counsel to examine the title in a convenient way (*h*); the abstract is all he sees; and if the very words used are not placed before him, it is impossible for him to exercise his judgment on the title. And counsel should not accept a mere statement of the effect of a material clause provisionally, subject to the statement proving to be correct; for this is to delegate the determination of a matter, to which he ought to apply his own judgment, to the discretion of the gentleman, who examines the abstract with the deeds (*i*). The general rule then is that the exact words of all material clauses should appear in the abstract.

What are material clauses.

The material clauses are those which have taken effect upon the estate, to which the title is being shown. Thus in deeds of conveyance, the names and descriptions of the parties, the recitals, which show their intention, the testatum with its statement of the consideration and operative words, the parcels, the habendum, and the declaration of uses or of trusts, if any, are all material to the conveyance of the estate and should be fully abstracted.

Covenants for title.

Of covenants for title, however, it is, as a rule, sufficient to know that they were entered into in the usual way. If therefore such covenants have been given at large in the common forms in use before the year 1882, it is enough to state their effect. When covenants for title have been incorporated in deeds under the Conveyancing Act, 1881, by the use

(*g*) 1 Dart, V. & P. 300-302, 5th ed.; 342-344, 6th ed.; 336-338, 7th ed.
(*h*) Ante, p. 97.
(*i*) See 1 Prest. Abst. 116, 117, 2nd ed.

Powers.

of the proper statutory expressions, these expressions should of course be abstracted *verbatim*. So all powers which are exercised by any abstracted document should be fully abstracted: but it is sufficient simply to refer to powers which have not been exercised. The same considerations apply to the abstracting of any provisoes which may abridge or affect the estate limited.

Shifting clauses.

Shifting clauses, for instance, should be fully abstracted, if they have come into operation; if not, they need only be mentioned with a statement of the events in which they were intended to operate.

Joint account clauses.

Joint account clauses ought to be fully abstracted, if they have taken effect.

Provisoes for redemption.

And a proviso for reconveyance should always be so abstracted as to show the charge created, the terms of redemption, and to whom the reconveyance is to be made; for in a mortgage the proviso for reconveyance, being a qualification of the conveyance to the mortgagee, is just as much an operative part of the deed as the conveyance itself (*k*). All documents material to the title should be abstracted in chief, notwithstanding that they may be fully recited in some subsequent instrument (*l*): but if this be done, the subsequent recital need not of course be set out at large; it will be sufficient to refer to the recited document as "hereinbefore abstracted." And all documents should be abstracted which are incorporated in the title by reference—as where land is assured to the uses of some settlement—even though the document be of an earlier date than the time of commencement of title (*m*).

Documents incorporated by reference.

(*k*) See 1 Prest. Abst. 147-153; Sug. V. & P. 407-410; and see Chap. V., below.

(*l*) 1 Dart, V. & P. 299, 5th ed.; 341, 6th ed.; 335, 7th ed.; *Re Stamford, &c. Co. and Knight's Contract*, 1900, 1 Ch. 287; *Re Wallis and Grout's Contract*, 1906, 2 Ch. 206. This is equally the case where the deed, in which the earlier document is recited, is twenty years old at the date of the contract for sale; and in such cases sect. 2, rule 2 of the Vendor and Purchaser Act, 1874 (stat. 37 & 38 Vict. c. 78, stated above, p. 40), does not oblige the purchaser to accept the recital as *primâ facie* evidence of the document recited, but the vendor is bound to abstract the earlier document in chief and to produce it; see *Re Wallis and Grout's Contract*, ubi sup. It is respectfully submitted that, in so far as the decision in *Re Arran and Knowlesden and Creer's Contract*, 1912, 2 Ch. 141, is contrary to this proposition, it is wrong; see the writer's criticism of this case in 63 Sol. J. 406.

Documents recited in deeds twenty years old.

(*m*) It is submitted that the above proposition is correct. A document may be said to be incorporated in a deed by reference when some of its provisions or the features of a plan drawn upon it form a material portion of the operative part of the deed, and are not set out therein but are merely referred as being contained in the document; for example, where land is assured to the uses then subsisting under the

Execution of deeds, &c. should be stated.

The abstract should always state what parties to any title-deed executed the same (*n*) and whether such execution was attested; and in the case of documents which are invalid unless attested by some particular number of witnesses or executed with some other special formality, such as wills (*o*), or deeds exercising powers required to be exercised with some special formality (*p*), the number of attesting witnesses or other circumstances attending the execution of the document in question should always be mentioned; so that the conveyancer may be satisfied that every requisite formality has been duly observed (*q*). The receipts usually endorsed on purchase and

settlement made by an indenture or a will of an earlier date, or is described by reference to the parcels contained in or the plan drawn on a deed of earlier date. The earlier document is then required to be abstracted and produced, not to prove what it did of itself effect as an assurance at the date of its execution, but simply to show what is the operative part of the deed, in which it is incorporated. And it is only as a part of that deed that the words or plan contained in the earlier document are wanted to be known. The purchaser cannot be properly *informed* what the words or plan referred to are without seeing an abstract of the material portions of the earlier document or a tracing of the plan drawn upon it (see below, p. 106). And such abstract cannot be duly *verified* without production of the earlier document to *prove* that the abstracted words or plan really are or is contained therein; see above, p. 39; below, § 3. When the matter is regarded in this way, it seems to be clear that the date of the earlier document is irrelevant. There can surely be no doubt that, when the earlier document is dated since the commencement of the title, the vendor is bound to abstract and produce it. And it is submitted that he is equally bound to do so when it is dated before the time of commencement of title; and that the purchaser is not precluded from requiring him to do so by sect. 3, sub-sect. 3 of the Conveyancing Act, 1881 (stat. 44 & 45 Vict. c. 41, stated above, p. 40, and discussed below, Chap. VI.); because the purchaser is not requiring proof of anything which took place before the commencement of title, but is merely asking for proof of the provisions of a deed executed since the commencement of title.

These contentions, however, are contrary to the decision of Warrington, J., in *Re Arran and Knowlesden and Creer's Contract,* 1912, 2 Ch. 141. But it is respectfully submitted that that decision was wrong; see the writer's criticism of this case in 63 Sol. J. 406.

(*n*) It is insufficient to state of an abstracted deed that it was "duly executed" or "executed": but it is of course sufficient to state that it was "executed *by all parties*," if such was the case.

(*o*) See Williams, Real Prop. 206, 13th ed.; 253, 23rd ed.

(*p*) Ibid. 298-302, 13th ed.; 417-420, 23rd ed.

(*q*) In such cases it is incorrect merely to state in the abstract that the document (such as a will) was "duly attested." It is for the purchaser's counsel to determine whether a document required to be attested in a special form was duly attested; and for this purpose he is entitled to be informed of the exact facts of the attestation. It may be noted here that the fact that a will has been proved is not conclusive evidence that it was duly executed as by law required for the devise of real estate; see below, Chap. IV. § 3, sub verb. *Will,* at end.

mortgage deeds before the year 1882 (*r*) should be mentioned, as their absence was accounted an informality (*s*). And any formality necessary to give complete effect to any abstracted document should be stated; as a probate of a will of personal estate (*t*), the registration of deeds or wills of lands in Middlesex or Yorkshire (*u*), the enrolment of a disentailing deed (*x*), or the acknowledgment (when necessary) of a deed of conveyance by a married woman (*y*).

Tracings of maps or plans.

It has been considered that a map or plan is no necessary part of an abstract (*z*). But the correctness of this opinion may be doubted; as the verification of the parcels is part of a conveyancing counsel's duty (*a*), and he cannot efficiently discharge it without seeing the plans referred to in the various title-deeds. And when, as is now very frequently the case, a conveyance is made identifying the parcels by reference to a plan, without any separate and independent description of them, it is obvious that the plan is really a material part of the deed, and ought as such to be included in the abstract. It is thought therefore that tracings of any plans referred to in the title-deeds should in all cases be inserted at their places in the abstract; and that, at least wherever a plan is a material part of a title-deed, the purchaser can require to be furnished with a copy thereof as part of the abstract (*b*).

§ 3. *Of the verification of the abstract.*

Vendor bound to verify the abstract.

Besides delivering an abstract of title, the vendor is further bound, in order to discharge his obligation of showing a good title, to verify the abstract by producing all the evidence which is necessary and proper to prove the statements made therein.

(*r*) Williams, Real Prop. 193-4, 13th ed.; 675, 688, 23rd ed.; Williams, Conv. Stat. 227, 229.

(*s*) Romilly, M. R., *Greenslade* v. *Dare*, 20 Beav. 284, 292; 3 Prest. Abst. 15, 2nd ed.

(*t*) Williams, Pers. Prop. 385, 11th ed.; 488, 17th ed.

(*u*) Williams, Real Prop. 196, 223, 13th ed.; 222, 278, 23rd ed.

(*x*) Williams, Real Prop. 49, 13th ed.; 102, 23rd ed.

(*y*) Ibid. 233, 13th ed.; 338, 342, 343, 346-349, 23rd ed.

(*z*) *Blackburn* v. *Smith*, 2 Ex. 783, 792, 18 L. J. N. S. Ex. 187; Sug. V. & P. 408.

(*a*) Sug. V. & P. 413.

(*b*) 1 Dart, V. & P. 303, 304, 5th ed.; 345, 346, 6th ed.; 339, 340, 7th ed. It is thought that the same principle is applicable to a plan drawn on a deed and incorporated by reference in a later deed; see above, p. 104 and n. (*m*).

The vendor must therefore produce, for the examination of the purchaser or his solicitor, all the abstracted deeds, both those which he has in his own possession and those of which he has a right to procure the production, and proper evidence of other documents, on which the title depends, such as wills, inclosure awards, Acts of Parliament or orders of the Court; and he must adduce proper evidence of all facts material to the title, as births, marriages, deaths or intestacies (*c*). At common law all such proof had to be made at the vendor's expense (*d*): but now under the Conveyancing Act, 1881, the purchaser, in the absence of stipulation to the contrary, has to bear the expense of obtaining and producing all evidence of title, which is not in the vendor's possession (*e*).

Expense of evidence not in vendor's possession.

The proof, which a vendor may be required to furnish of his title, is of two kinds; (1) proof of the abstracted documents, and (2) proof of the facts stated in the abstract. In both of these respects the evidence accepted on sales is not quite the same as what would be required to be given in a Court of justice. Thus where it is sought to prove in Court that any person has altered his legal position by some writing, it must be shown, first, that there is or was such a writing as alleged; this is proved primarily by production of the original; and secondly, that the writing is his writing; that is to say, if the writing be a deed, that it is his deed, that is, executed by him, or, if the writing be unsealed, that it was signed or written by him or by his authority so as to bind him (*f*). At common law, the second requisite was only dispensed with in the case of documents thirty years old coming from the proper custody; these, whether deeds, wills, letters or similar writings, were and are presumed to have been executed or signed as they purport to be (*g*). In other cases, the execution of any document produced must as a rule have been proved, if the document were attested, by the evidence of an attesting witness, and otherwise by the

Evidence required is (1) of documents, (2) of facts.

Proof on sales differs from proof in litigation.

Documents thirty years old prove themselves.

(*c*) Sug. V. & P. 414, 415, 417, 420, 429, 431; 1 Dart, V. & P. 310 *sq.*, 5th ed.; 350 *sq.*, 6th ed.; 345 *sq.*, 7th ed.; *Southby* v. *Hutt*, 1 My. & Cr. 207, 212, 213.

(*d*) Sug. V. & P. 417, 420, 431.

(*e*) Stat. 44 & 45 Vict. c. 41, s. 3 (6, 9); *Re Conlon and Faulkener's Contract*, 1916, 1 I. R. 241.

(*f*) *Leyfield's Case*, 10 Rep. 88a, 92b, 93a.

(*g*) Taylor, Evidence, §§ 74, 75, 593-601, 5th ed.; Stephen, Evidence, Art. 88.

Proof of attested documents.

best evidence, such as the testimony, given in Court at the trial, of the party who executed the document, or some other person present at its execution, or an admission by or on behalf of such party of the fact of execution (*h*). The common law rule as to proving the execution of attested documents was so stringent that such execution could not be proved by the admission of the executing party, unless made for the purposes of the cause (*i*). This rule was abolished by the Common Law Procedure Act, 1854, with regard to any instrument, to the validity of which attestation is not requisite; and such instruments may be proved by admission or otherwise, as if there had been no attesting witness thereto (*k*). Under the present practice, the execution of any deed or writing adduced in evidence in an action is generally established by admission made pursuant to a notice in that behalf, which either party may serve on the other (*l*); but of course where there is any contest as to the fact of execution, it must be proved by the best evidence according to the ordinary rule (*m*). And on unopposed applications and in non-contentious cases the rule still is that the execution of a deed must be proved by an attesting witness (*n*). Upon sales of land, however, it is not the practice to require evidence of the execution of any of the documents of title, however recent, if found in the proper custody (*o*); unless there be reason to suspect that some particular document was not in fact executed as it purports to be. In the absence of any cause for suspicion, it is presumed by conveyancers that every deed, will or other document of title was executed or signed as appears on the face of the document (*p*). Conveyancers act, in this respect, on the presumption that everything is rightly done, until the contrary be shown (*q*); a presumption which is

No evidence of the execution of any document required on sales.

(*h*) Taylor, Evidence, §§ 1637 *sq.*, 1660, 5th ed.; Stephen, Evidence, Arts. 15 *sq.*, 63-69.

(*i*) *Call* v. *Dunning*, 4 East, 53; *Doe* v. *Durnford*, 2 M. & S. 62.

(*k*) Stats. 17 & 18 Vict. c. 125, s. 26; 28 & 29 Vict. c. 18, ss. 1, 7.

(*l*) R. S. C. 1883, Ord. XXXII. rr. 2, 3, and Appendix B. No. 11.

(*m*) *Leigh* v. *Lloyd*, 35 Beav. 455, 457, 458.

(*n*) *Re Reay's Estate*, 1 Jur. N. S. 222; *Re Rice*, 32 Ch. D. 35; 1 Seton on Judgments, 154, 7th ed.

(*o*) That is, the custody in which they may reasonably be expected to be found; *Croughton* v. *Blake*, 12 M. & W. 205, 208; *Doe* d. *Jacobs* v. *Phillips*, 8 Q. B. 158.

(*p*) Coventry, Conveyancers' Evidence, 13-16; 1 Sug. V. & P. 418, 438; 1 Dart, V. & P. 312, 5th ed.; 353, 6th ed.; 348, 7th ed. See *Jared* v. *Clements*, 1902, 2 Ch. 399, 402; 1903, 1 Ch. 428, 431.

(*q*) Litt. sect. 377; Co. Litt. 232 b; *Clarke* v. *Imperial Gas Light*

of course greatly strengthened by the fact of the title-deeds being in the custody of the possessors of the land, to which the deeds relate.

What is the strict right of a purchaser as to proof of execution of title-deeds?

The strict right of a purchaser of land in the matter of requiring proof of the execution of the title-deeds has never been exactly defined. Under the old common law practice requiring strict proof of attested documents (*r*), there were conflicting decisions at *Nisi Prius* upon the question whether a vendor suing the purchaser at law for damages for breach of contract must prove the execution of the title-deeds as part of his title (*s*). It was pointed out, however, that such actions are usually brought in consequence of a dispute raised as to the vendor's title—that is, as to the *effect* of the deeds—after the delivery of an abstract and communications thereon, in the course of which the *authenticity* of the deeds has been admitted; and that in such circumstances the purchaser would not be permitted to turn round at the trial and require proof of the genuineness of the deeds themselves (*t*). Under the present practice—first introduced by the Common Law Procedure Act, 1852—any litigant may call upon his adversary to admit any document, saving all just exceptions, on pain, in case of unreasonable refusal, of being ordered to pay the costs of proof (*u*). It is thought, considering the long-established practice of conveyancers not to require proof of the execution of title-deeds and the above-mentioned alterations in the law (*x*) and practice as to the proof of documents in an action, that the Court would certainly not uphold a requisition, that the vendor

and Coke Co., 4 B. & Ad. 315; *D'Arcy* v. *Tamar, &c. Ry. Co.*, L. R. 2 Ex. 158, 162; *Clippens Oil Co.* v. *Edinburgh, &c. Trustees*, 1904, A. C. 64, 69; *Heath* v. *Deane*, 1905, 2 Ch. 86, 93.

(*r*) Above, p. 108.

(*s*) That he need not, *Thomson* v. *Miles*, Kenyon, C. J., 1 Esp. 184; that he must, *Crosby* v. *Percy*, Mansfield, C. J., 1 Camp. 303. Lord St. Leonards evidently thought the former the right decision; Sug. V. & P. 439.

(*t*) Tindal, C. J., *Laythoarp* v. *Bryant*, 1 Bing. N. C. 421, 427. The decision there was, that in the absence of any such communications as might establish the admission of the authenticity of the deeds, a vendor suing to recover under special stipulation in the contract the amount of the loss on a re-sale of leasehold property rejected by the original purchaser, and alleging himself to have been *in possession of the property under the lease*, must prove this allegation by showing the execution of the lease in the usual way.

(*u*) Stat. 15 & 16 Vict. c. 76, s. 117; R. S. C. Ord. XXX. r. 2.

(*x*) Above, p. 108.

must prove the execution of any document of title less than thirty years old, if made without showing any reason for suspecting the authenticity of the document (*y*).

Title-deeds executed by attorney.

Here it should be mentioned that, whenever any title-deed has been executed by attorney, the deed (*z*) creating the power of attorney so acted upon ought to be abstracted and produced; and either it should be handed over to the purchaser on completion, or (if the vendor or any other person is entitled to retain it) a statutory acknowledgment and undertaking should be given for its production and safe custody (*a*). Besides this, evidence should be furnished, if necessary, that the power was not revoked by the donor's death or otherwise before it was so acted upon (*b*). Such evidence appears to be unnecessary, so far as regards the payment to and the receipt by the attorney of any consideration money which he was authorised to receive, or the assurance of any equitable estate which would be extinguished or transferred by the fact of such payment in the following cases:—(1) Where the power was given before the year 1883 for valuable consideration (*c*); (2) where the power was given by an instrument executed after the year 1882 for valuable consideration and was therein expressed to be irrevocable (*d*); and (3) where the power was given by an instrument executed after that year (whether for valuable consideration or not) and expressing that the power should be irrevocable for a fixed time therein specified, not exceeding one

(*y*) See 1 Dart, V. & P. 312, 5th ed.; 353, 6th ed.; 348, 7th ed.

(*z*) A power of attorney authorising one to execute a deed on behalf of another is required by law to be given by deed; *Hibblewhite* v. *McMorine*, 6 M. & W. 200, 214, 216; *Powell* v. *London & Provincial Bank*, 1893, 2 Ch. 555, 558, 563, 565. At common law an attorney authorized to execute a deed was bound to execute it in the name of his principal, and not in his own name; otherwise the execution would be void; *Combes's Case*, 9 Rep. 75 a, 76 b; *Frontin* v. *Small*, 2 Ld. Raym. 1418; *White* v. *Cuyler*, 6 T. R. 176; *Wilks* v. *Back*, 2 East, 142; *Lawrie* v. *Lees*, 14 Ch. D. 249, 7 App. Cas. 19. But in deeds executed by attorney after the year 1881 the attorney might and still may (whatever the date of the instrument creating the power) execute the deed either in his principal's name according to the common law rule or in his own name and with his own signature and seal under the authority of the Conveyancing Act, 1881, stat. 44 & 45 Vict. c. 41, s. 46; 1 Davidson, Prec. Conv. 101, 5th ed.

(*a*) See *Eaton* v. *Sanxter*, 6 Sim. 517, 519; above, pp. 34, 44, 45.

(*b*) Sug. V. & P. 417; 1 Dart, V. & P. 311, 312, 5th ed.; 352, 353, 6th ed.; 348, 7th ed.

(*c*) See below, Chap. XII. § 5.

(*d*) See stat. 45 & 46 Vict. c. 39, s. 8; below, Chap. XII. § 5.

year from the date of the instrument (*e*), and the power was acted upon within that time. But with respect to the conveyance by the attorney of any legal estate in land, which in consequence of the principal's death might no longer be vested in him at the time of such conveyance, it appears that in the first of these cases the attorney would have no power to convey such legal estate after the principal's death; and that in the second and third it is an undecided question whether the attorney is effectually empowered by the 8th or 9th section of the Conveyancing Act, 1882 (*f*) to convey after the principal's death any legal estate which is then vested in the principal's heirs, devisees or personal representatives (*g*). It seems therefore that in all these cases a purchaser should still require evidence that the principal was alive at the time of the attorney's execution of the conveyance, in order to be satisfied that the principal's legal estate did in fact pass by such conveyance. And where the power was given otherwise than as in the three cases specified above, the purchaser may, and should, require evidence to be furnished that the power was not revoked by the donor's death or otherwise before it was acted upon (*h*).

Documents of title may be in private or official custody.

The documentary evidence in support of a title may be of two kinds. First, private writings which are kept in the custody of the parties interested, and which the purchaser can require to be handed over to him on completion; of this kind are the ordinary deeds of conveyance. And secondly, documents which are kept in public or official custody and to the possession of which the purchaser can have no right. Such are Acts of Parliament public or private, records, orders or proceedings of the Courts of justice, the court rolls of a manor, and wills, if proved. With regard to the latter kind of evidence, the vendor cannot require the purchaser to go and verify the abstract for himself by inspection of the original document; he is bound to produce, at the proper place for verification of the abstract, such evidence of any document in public or official custody as it is the practice for conveyancers to accept; and the purchaser will be entitled *primâ facie* to have this evidence delivered over

Vendor must produce evidence of documents in official custody.

(*e*) See stat. 45 & 46 Vict. c. 39, s. 9; below, Chap. XII. § 5.
(*f*) Stat. 45 & 46 Vict. c. 39.
(*g*) See below, Chap. XII. § 5, where this question is discussed.
(*h*) See note (*b*), above, p. 110.

to him on completion (*i*). At common law, the vendor had to bear all the expense of procuring any such evidence (*i*). But under the Conveyancing Act, 1881 (*k*), the purchaser, in the absence of stipulation to the contrary, must bear the expense of procuring all such evidence, if not in the vendor's possession. The vendor, however, is not released from the obligation of procuring such evidence; he is merely exonerated from the expense of discharging it (*l*).

Expense of procuring documents not in vendor's possession.

Evidence of public document.

Examined copy.

Exemplification.

Office copies.

Certified copies.

Here it may be mentioned that, in litigation, the contents of any public document may be proved, at common law, either by production of the original document or its equivalent, or by an examined copy, that is, a copy proved by oral evidence to have been examined with the original and to correspond therewith (*m*). An exemplification, which is a copy of a record set out either under the great seal or the seal of a Court, is equivalent to the original document exemplified (*n*); and a copy made by an officer of the Court, who is *bound by law to make it*, is equivalent to an exemplification (*o*). Office copies, or copies made by an officer of the Court, who is authorised by rule of Court *but not required by law* to make them, are not at common law equivalent to an exemplification, save in the same Court *and cause*, in which the proceeding recorded occurred (*p*). But many documents of a public nature are provable under particular Acts of Parliament by copies certified as authentic under some official seal or signature or otherwise (*q*); and in such cases the certified copies are admissible in evidence if they

(*i*) Sug. V. & P. 431, 448; 1 Dart, V. & P. 408, 5th ed.; 472, 6th ed.; 482, 7th ed.; 1 Davidson, Prec. Conv. 550, 555, 4th ed.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 3 (6, 9).

(*l*) See *Halkett* v. *Dudley*, 1907, 1 Ch. 590, 603, 604.

(*m*) *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102, 106, 124; *Permanent Trustee Co. of New South Wales* v. *Fels*, 1918, A. C. 879, 885; *Lipton* v. *Powell*, 1921, 2 K. B. 51, 61, 65; Taylor, Evidence, §§ 1333, 1368, 1389 *sq.*, 5th ed.; Stephen, Evidence, Arts. 73 *sq.* The rule extends to any document or book which is of such a public nature as to be admissible in evidence on its mere production from the proper custody; *R.* v. *Hains*, Comb. 337; *Lynch* v. *Clerke*, 3 Salk. 154; *R.* v. *Gordon*, 2 Doug. 590, 593 and note; Taylor, Evidence, §§ 1436, 1437, 5th ed.

(*n*) Bac. Abr. Evidence (F); Taylor, Evidence, §§ 1378—1381, 5th ed.; Stephen, Evidence, Art. 77.

(*o*) *Appleton* v. *Lord Braybrook*, 6 M. & S. 34, 36—39; *Doe* v. *Lloyd*, 1 Man. & Gr. 671, 684-6; Bac. Abr. Evidence (F); Taylor, Evidence, § 1384, 5th ed.; Stephen, Evidence, Art. 77.

(*p*) Taylor, Evidence, §§ 1378—1391, 5th ed.; Stephen, Evidence, Art. 78.

(*q*) Taylor, Evidence, § 1440, 5th ed.

purport to be authenticated as prescribed by law, without proof of the official stamp, seal or signature required or of the official character of the certifier (*r*). And by the Evidence Act, 1851 (*s*), whenever any book or document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no Statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence if it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted. On sales, however, it has always been the practice to receive office copies and extracts in evidence, whether the same would be admissible as evidence in litigation or not (*t*).

Proper place for verification of the abstract.

The proper place for verification of the abstract is either at the vendor's residence, or near the land sold, or in London (*u*). If the title-deeds be produced at any one of these places, the purchaser must, at common law, bear the expense of his solicitor's examination of them and of any journey for this purpose (*x*). The vendor may however discharge his obligation

(*r*) Stat. 8 & 9 Vict. c. 113, s. 1; Taylor, Evidence, §§ 7, 1441, 5th ed.; Stephen, Evidence, Art. 79.

(*s*) Stat. 14 & 15 Vict. c. 99, s. 14; Taylor, Evidence, § 1437, 5th ed.; Stephen, Evidence, Art. 79; *Lipton* v. *Powell*, 1921, 2 K. B. 51, 61, 65.

(*t*) Sug. V. & P. 414, 417; 1 Dart, V. & P. 318, 5th ed.; 361, 6th ed.; 1 Davidson, Prec. Conv. 550-2, 4th ed.; *Halkett* v. *Dudley*, 1907, 1 Ch. 590, 603, 604. It should be noted that proof of a public document by what is called an examined copy is not available on sales, as the admissibility in evidence of such a copy depends on the statements made on oath in Court of the person who examined the copy with the original; *Crawford Peerage*, 2 H. L. C. 544-5; *Permanent Trustee Co. of New South Wales* v. *Fels*, 1918, A. C. 879, 885; Taylor, Evidence, § 1389, 5th ed. And an attested copy, that is a copy endorsed with a written and signed declaration that it is a true copy, is of no more use to a purchaser than an office copy, the declaration not being evidence admissible in subsequent litigation; see above, p. 112.

(*u*) If the deeds are to be examined in London, a country solicitor must employ a London agent for the purpose; and he cannot charge his client with the expense of a journey, even though undertaken at his client's request, in order to examine the deeds personally, unless he first explain to his client what is the regular practice. But a London solicitor need not employ a country solicitor as his agent to examine deeds, but may send his own clerk. See *Alsop* v. *Oxford*, 1 My. & K. 564; *Hughes* v. *Wynne*, 8 Sim. 85; *Re Tryon*, 7 Beav. 496; Sug. V. & P. 430; 1 Dart, V. & P. 407, 408, 5th ed.; 470, 471, 6th ed.; 481, 482, 7th ed.

(*x*) Sug. V. & P. 429; 1 Dart, V. & P. 407, 5th ed.; 470, 6th ed.; 481, 7th ed.; 1 Davidson, Prec. Conv. 554, 4th ed.

by production of all or some of the title-deeds at some other place or places; but in that case he would at common law be bound to pay any additional expense incurred by the purchaser in the examination of the deeds, beyond what would have been occurred if the deeds had been produced at the proper place (*y*).

Expense of examining title-deeds not in vendor's possession.

But under the Conveyancing Act, 1881 (*z*), the purchaser, in the absence of stipulation to the contrary, must bear the expenses of the production and inspection of all documents, which are not in the vendor's possession, and of all journeys incidental thereto. The vendor therefore must still produce all documents of title, which are in his own possession, at the proper place for verification of the abstract; or pay the extra expense incurred by their examination elsewhere (*a*). But in the absence of stipulation to the contrary, he can produce any documents of title, which are not in his possession, at whatever place they may happen to be, without being called upon to bear any extra expense so caused. It has been held that, under the last-mentioned enactment, a purchaser must pay all the expense of the examination on his behalf of title-deeds, which are in the possession of the vendor's mortgagees, and are in consequence produced at the office of the mortgagees' solicitors; including the mortgagees' solicitors' costs of such production and examination (*b*). The purchaser must equally bear all the expense of the production and examination of any title-deeds, which are produced at the office of the solicitors to some person, by whom the vendor is entitled to require production of the deeds under some statutory acknowledgment or covenant.

Deeds in possession of vendor's mortgagees—

or other persons than the vendor.

Mortgagor's right of access to title-deeds in possession of a mortgagee under a mortgage made after 1881.

Here it may be mentioned that by the Conveyancing Act, 1881, where a mortgage has been made after the 31st December, 1881, the mortgagor, as long as his right to redeem subsists, is entitled from time to time, at reasonable times, on his request, and at his own costs, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee; and this enactment is to have effect, notwithstanding any

(*y*) *Sharp* v. *Page*, Sug. V. & P. 430; *Hughes* v. *Wynne*, 8 Sim. 85; 1 Dart, V. & P. 408, 5th ed.; 471, 6th ed.; 482, 7th ed.; 1 Davidson, Prec. Conv. 554, 4th ed.

(*z*) Stat. 44 & 45 Vict. c. 41, s. 3 (6, 9).

(*a*) See 1 Davidson, Prec. Conv. 461, 5th ed.

(*b*) *Re Willett and Argenti*, 5 Times L. R. 476; 60 L. T. N. S. 735.

stipulation to the contrary (*c*). A vendor of land, which is subject to a mortgage made after the year 1881, thus enjoys the right of access to the title-deeds for the purpose of preparing and verifying the abstract. But where the mortgage was made before the year 1882, the old rule remains in force that the mortgagee in possession of the title-deeds of the mortgaged property cannot be compelled to produce them for the inspection of the mortgagor or any one claiming through him, without being paid off (*d*). In such case therefore the vendor must arrange with the mortgagee for production of the title-deeds (*e*).

Mortgagee's right where the mortgage was made before 1882.

(*c*) Stat. 44 & 45 Vict. c. 41, s. 16; see also sects. 1, 2.

(*d*) *Senhouse* v. *Earl*, 2 Ves. sen. 450; *Postlethwaite* v. *Blythe*, 2 Swanst. 256, 257; *Brown* v. *Lockhart*, 10 Sim. 420; *Greenwood* v. *Rothwell*, 7 Beav. 291; *Chichester* v. *Donegal*, L. R. 5 Ch. 497, 502. According to these cases the rule extends to the mortgage deed itself; and the decision to the contrary in *Patch* v. *Ward*, L. R. 1 Eq. 436, appears to be incorrect. Where the mortgage was made before the year 1882, the old rule applies to documents modifying the terms of but not entirely superseding and discharging the contract of mortgage and executed after the year 1881; *Burn* v. *London & South Wales Coal Co.*, 1890, W. N. 209.

Mortgagor's right to redeem, on what terms exercisable.

(*e*) With respect to the concurrence of any mortgagee (whatever be the date of his mortgage) in a sale by the mortgagor of the mortgaged property (see above, p. 44), the mortgagor's right, where the mortgage is in the usual form, evidencing an intention to confer a permanent security, and the day for redemption at law is past, and the mortgagee has made no express or implied demand for repayment of the mortgage money, is to redeem on payment of the whole amount due on the mortgage for principal, interest and costs (*National Provincial Bank of England* v. *Games*, 31 Ch. D. 582), and either after giving six calendar months' previous notice of his intention to redeem, or on payment instead of six calendar months' interest in advance; *Sharpnell* v. *Blake*, 2 Eq. Ca. Abr. 603, pl. 34; *Johnson* v. *Evans*, 1889, W. N. 95, 61 L. T. 18; *Smith* v. *Smith*, 1891, 3 Ch. 550, 552; *Fitzgerald's Trustee* v. *Mellersh*, 1892, 1 Ch. 385, 388, 389. Where the mortgagee has demanded, or has taken any legal proceedings to enforce repayment of the mortgage money, or has sold or taken possession of the mortgaged property, the mortgagor is absolved from the obligation of giving notice to pay off or paying interest in lieu of notice; *Sharpnell* v. *Blake*, ubi sup.; *Letts* v. *Hutchins*, L. R. 13 Eq. 176; *Banner* v. *Berridge*, 18 Ch. D. 254, 279; *Re Alcock*, 23 Ch. D. 372; *Bovill* v. *Endle*, 1896, 1 Ch. 648; *Edmondson* v. *Copland*, 1911, 2 Ch. 301. Where the just inference from the mortgage transaction is that it was intended to be temporary, as in the case of a mortgage to bankers by deposit of title-deeds, the mortgage is redeemable at any time without giving notice to pay off or paying interest in advance instead; *Fitzgerald's Trustee* v. *Mellersh*, 1892, 1 Ch. 385. A mortgage is not redeemable before the day fixed for redemption *at law* has arrived, not even on tender of the whole principal money with interest up to that date; *Brown* v. *Cole*, 14 Sim. 427; unless the mortgagee has taken steps (as by entry into possession) to enforce repayment of the mortgage money; *Bovill* v. *Endle*, ubi sup. And this rule applies where a mortgage is made with a proviso that the security shall remain for a certain term of years of reasonable length; *Biggs* v. *Hoddinott*, 1898, 2 Ch. 307, 311. As to mortgages redeemable at law on payment

Deeds, of which the vendor has a mere right to production.

With regard to any title-deeds, of which a vendor of land has a mere right to production (the right to *possession* of the deeds going with other land held under the same title (*f*), or otherwise not accompanying the land sold), the question, whether he can be prejudiced by the possessor of the deeds depositing them with a mortgagee, depends on the nature of his right to production of the deeds.

Right to production under statutory acknowledgment.

If the right to production arise under a statutory acknowledgment taking effect by virtue of the Conveyancing Act of 1881 (*g*), the duty of production is incumbent on and may be enforced against, not only the giver of the acknowledgment, but also every other person having possession or control of the deeds from time to time. Production of the deeds may therefore be enforced when they are in the custody of mortgagees or purchasers from the giver of the acknowledgment; and it is immaterial whether the mortgagee or purchaser had notice of the acknowledgment or not.

Where the vendor has a mere equitable right of production.

If however the vendor have only an equitable right to production of the deeds, such as appears to arise without express agreement when land held under one title or the estate therein is severed, and the right to the custody of the deeds goes with some particular part of the land or estate (*h*), it seems that he may lose the benefit of such right in case the land or estate, to which the possession of the deeds is incident, be conveyed (together with the deeds) to a purchaser or mortgagee, who had no notice of the equitable obligation to produce the deeds (*i*). And it seems that this is equally the

by instalments, see *Cummins* v. *Fletcher*, 14 Ch. D. 699, 702, 713, 714. A vendor of land in mortgage is of course entitled, on redemption in strict accordance with his *right*, to require the mortgagee to convey at his (the vendor's) cost the mortgaged property to the purchaser; *Rourke* v. *Robinson*, 1911, 1 Ch. 480; *Webb* v. *Crosse*, 1912, 1 Ch. 323, 320. But if he desire the mortgagee to acquiesce in any arrangement, which he is not strictly entitled to enforce, with respect to the sale, as if he wish the mortgagee to release part of the mortgaged property from his security, either on payment of part of the mortgage money or without payment, or to waive the right (where given) to have the security to remain for a certain term, he must come to an agreement with the mortgagee, or he will be unable to enforce the contract of sale; see below, Chap. V.; Chap. XII. § 3.

(*f*) See above, p. 44.

(*g*) Stat. 44 & 45 Vict. c. 41, s. 9; see sub-ss. 1, 2. The statutory undertaking for safe custody is equally enforceable against the undertaker and every person having possession or control of the documents from time to time; sub-s. 9.

(*h*) See below, Chap. XII. § 3.

(*i*) See below, Chap. XII. § 3; *Wallwyn* v. *Lee*, 9 Ves. 24; *Lambert* v. *Rogers*, 2 Mer. 489; *Heath* v. *Crealock*, L. R. 10 Ch. 22, 32, 33, 35. With respect to the rule affirmed in the last case that a Court of Equity will not interfere to deprive a purchaser for value of the possession of

Where the vendor has a covenant for production of the deeds.

case, where the vendor has the benefit of a covenant to produce the deeds, but the landowner in possession of them has conveyed his land with the deeds to a purchaser or mortgagee having no notice of the covenant; for it is now considered that the burthen of a covenant to produce title-deeds does not run *at law* with the land, to the ownership of which the possession of the deeds is incident. But where a mortgagee or purchaser has taken the land with notice of an equitable right to production of the title-deeds, it is thought that he would be bound to give effect to it (*k*).

Solicitor's lien.

When a man's title-deeds are in the custody of his solicitor, who has the regular solicitor's lien thereon for the general balance owing of his account (*l*), the solicitor has the right to refuse inspection or production of the deeds, as well as to keep them in his possession until his account is paid; and he can assert this right as against all persons who may subsequently become purchasers or mortgagees of the land to which the deeds relate (*m*). But where a solicitor, who has a lien on his client's title-deeds, is instructed to act for the client in the matter of a sale proposed or agreed upon of the land, to which the deeds relate, it is his duty, if he intend to assert his lien as a bar to the production or delivery of the deeds to the purchaser, to call his client's attention thereto (*n*); and it is thought that if he should omit to do this, he would be taken to have waived his right to obstruct the sale by refusing to allow the purchaser to

Solicitor, having a lien on a vendor's deeds, instructed to act for him in the sale.

title-deeds acquired in good faith and without notice of a superior right (whether legal or equitable) thereto, note the difference under the present law where a *legal* right to the possession of deeds is sought to be enforced in the Chancery Division; *Re Cooper,* 20 Ch. D. 611; *Re Ingham,* 1893, 1 Ch. 352, 361.

(*k*) See below, Chap. XII. § 3. In any case in which the liability to produce a title-deed is really incident to the legal estate in some land, a purchaser or mortgagee is of course affected by it. Thus the assignee of a lease, whether by way of sale, mortgage or otherwise, is bound to produce the lease in aid of the lessor suing him on some covenant contained therein; *Balls* v. *Musgrave,* 3 Beav. 448, 4 Beav. 119.

(*l*) *Expte. Sterling,* 16 Ves. 258; *Stevenson* v. *Blacklock,* 1 M. & S. 535; *Re Morris,* 1908, 1 K. B. 473.

(*m*) *Lord* v. *Wormleighton,* Jac. 580, 582; Cottenham, C., *Bozon* v. *Bolland,* 4 My. & Cr. 354, 358; Sugden, Ir. C., *Blunden* v. *Desart,* 2 Dru. & War. 405, 418, 420, 421, 425-431; *Pelly* v. *Wathen,* 1 De G., M. & G. 16, 23; *Re Faithfull,* L. R. 6 Eq. 325; *Re Biggs and Roche* (1897), 41 Sol. J. 277; Vaughan Williams, L. J., *Re Hawkes,* 1898, 2 Ch. 1, 24, 25; Neville, J., *Re Rapid Road Transit Co.,* 1909, 1 Ch. 96, 99 *sq.*

(*n*) *Re Safety Explosives, Ltd.,* 1904, 1 Ch. 226, 231, 234, 235, 237, 238.

inspect the deeds (*o*). But it does not appear that the mere omission of the solicitor to call his client's attention to his lien before undertaking the business of the sale, would prevent him from asserting his lien as a bar to the delivery of the title-deeds to the purchaser on completion (*o*); and if he should hand over the deeds to the purchaser, without making any arrangement with his client for satisfaction of what is due to him out of the purchase money or otherwise, he would lose all the benefit of his lien (*p*). If a solicitor having a lien on the vendor's title-deeds agree to act for the purchaser as well as for the vendor in the matter of the sale, it is thought that, unless he expressly reserve his lien by agreement with the purchaser, he cannot assert it in opposition to the duty, which he has undertaken on the purchaser's behalf, of procuring inspection of the deeds for verification of the abstract and delivery thereof to the purchaser on completion (*q*). A solicitor's lien cannot be asserted against any right to production or delivery up of the deeds which is paramount to his client's right to withhold or retain them (*r*). Thus if title-deeds be in the possession of a mortgagee, whose solicitors have them in their custody and so acquire a lien thereon, they cannot withhold the deeds from the mortgagor claiming either to have the deeds delivered up to him on payment of all moneys due under the mortgage (*s*), or to inspect the deeds by virtue of his right under the Conveyancing Act, 1881 (*t*). So where a mortgagor is allowed to keep the

Where the solicitor acts for both vendor and purchaser.

Solicitor's lien is commensurate with his client's right to withhold the deeds.

(*o*) This appears to follow from the principles laid down in the cases deciding that, where a solicitor, who has undertaken to act for his client in some action or proceeding, discharges himself before it is completed, he must give up all documents received from his client in the course of the proceedings to the new solicitor chosen by his client to be inspected or produced for the purposes of the proceedings, but to be held by the new solicitor subject to the old solicitor's lien thereon; *Colegrave* v. *Manley*, T. & R. 400; *Heslop* v. *Metcalfe*, 8 Sim. 622, 3 My. & Cr. 183, 189; *Griffiths* v. *Griffiths*, 2 Hare, 587, 590, 592; *Robins* v. *Goldingham*, L. R. 13 Eq. 442; *Re Hawkes*, 1898, 1 Ch. 1, 18-20, 25, 26; *Re Rapid Road Transit Co.*, 1909, 1 Ch. 96, 99; see also the cases cited in the two previous notes.

(*p*) *Re Safety Explosives, Ltd.*, ubi sup.

(*q*) See *Hicks* v. *Keat*, 3 Jur. 1024; *Re Mosely*, 15 W. R. 975; *Re Snell*, 6 Ch. D. 105; *Re Mason and Taylor*, 10 Ch. D. 729; *Macfarlane* v. *Lister*, 37 Ch. D. 88, 94; *Brunton* v. *Electrical Engineering Corpn.*, 1892, 1 Ch. 434, 439; all cases of solicitors acting both for mortgagor and mortgagee.

(*r*) *Blunden* v. *Desart*, 2 Dru. & War. 405, 418, 419; *Pelly* v. *Wathen*, 1 De G., M. & G. 16, 23, 24; *Re Hawkes*, 1898, 2 Ch. 1, 7, 13.

(*s*) *Wakefield* v. *Newbon*, 6 Q. B. 276; *Re Llewellin*, 1891, 3 Ch. 145.

(*t*) Above, p. 116.

title-deeds for a while and his solicitor so acquires (since the mortgage) a lien thereon, the solicitor cannot resist the mortgagee's paramount right to recover possession of the deeds (*u*). And the solicitor of a tenant for life in possession of title-deeds cannot assert his lien thereon after his client's death against the remainderman claiming to have the deeds delivered up to him (*x*). Also, if a solicitor have a lien on his client's title-deeds, and the client subsequently make some sale or mortgage of the land without disturbing the lien (the deeds remaining in the solicitor's possession by virtue thereof), the lien can only be asserted as a security for costs incurred before the date of the sale or mortgage, and not for any costs afterwards incurred against the vendor or mortgagor (*y*).

Stamps.

In connection with the production of the abstracted documents, we may mention that the purchaser is entitled to require that every document, on which the proof of the title to the lands sold depends, shall be so stamped, if necessary, as to be available as evidence in a court of justice; insufficiently stamped documents not being, as a rule, receivable in evidence except on payment of a penalty (*z*). If therefore any such document, which is required by law to be stamped, be unstamped or insufficiently stamped, the vendor is bound to procure it to be properly stamped at his own expense; and the purchaser should require him to do so (*a*). In consequence of this liability, vendors often specially stipulated, where necessary, that it should be no objection to the title that any abstracted document appeared to be unstamped or insufficiently stamped, and that the purchaser should bear the expense of procuring any such document to be duly stamped. But it is now enacted (*b*) that every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insuffi-

(*u*) *Smith* v. *Chichester,* 2 Dru. & War. 393; *Pelly* v. *Wathen,* 1 De G., M. & G. 16.

(*x*) *Davies* v. *Vernon,* 6 Q. B. 443, 447.

(*y*) *Blunden* v. *Desart,* 2 Dru. & War. 405, 420, 421, 427-431.

(*z*) See stat. 54 & 55 Vict. c. 39, ss. 14, 15, replacing 33 & 34 Vict. c 97, ss. 15—17, and 17 & 18 Vict. c. 125, ss. 28, 29; Sug. V. & P. 566.

(*a*) *Whiting* to *Loomes,* 14 Ch. D. 822; 17 Ch. D. 10; *Re Lovell and Collard's Contract,* 1907, 1 Ch. 249; above, p. 43; for a distinction, see *Expte. Birkbeck Freehold Land Society,* 24 Ch. D. 119.

(*b*) Stat. 54 & 55 Vict. c. 39, s. 117, replacing 51 & 52 Vict. c. 8, s. 20.

ciency of stamp upon any instrument executed after the 16th day of May, 1888, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument, or indemnifying against such liability, absence, or insufficiency, shall be void. So that if any such special stipulation be now made, it must be limited to instruments executed before or on that day (*c*). Such stipulations should not of course be made unless there be reason to suppose that some document of title is insufficiently stamped.

Evidence of facts required on sales.

With regard to the evidence necessary to prove the facts as distinct from the documents stated in an abstract, what a purchaser requires is testimony reduced to writing so that it may be preserved as a muniment of title. So far as the facts may be proved by written evidence admissible in a court of justice, a purchaser is entitled to call for such evidence, if it can be obtained. But if none such can be procured, he must accept other evidence such as it is the established practice to receive on sales. For example, in the matters of pedigree, to prove the facts of birth, marriage and death the purchaser is in the first instance entitled to require certificates of baptism or birth, of marriage and of burial: but if these cannot be found, the vendor may not only have recourse to other evidence admissible in litigation, as statements of deceased members of the family or entries in a family Bible or register, but in default of such testimony he may proffer statutory declarations of living members of the family or even of strangers. The written declaration of a living member of the family as to a matter of pedigree may become good evidence after his death, but is inadmissible in court in his lifetime; whilst the like declaration of a stranger can never be evidence admissible in litigation (*d*): but on sales such declarations are nevertheless received (*e*).

Evidence that certain events, which would certainly have

The purchaser is entitled, pursuant to his right to require proof of all facts material to the title, to call for evidence, not only that the events stated in the abstract took place, but also

(*c*) 1 Key & Elphinstone, Prec. Conv. 255, 263, 4th ed.; 261, 276, 10th ed.; see above, p. 72.

(*d*) See Stephen, Evidence, Arts. 25, 31.

(*e*) Sug. V. & P. 418; 1 Dart, V. & P. 347, 5th ed.; 393, 6th ed.; 388, 7th ed.

that other events, of which the occurrence must necessarily have affected the title, did not happen. That an event did not happen is in many cases a matter of inference rather than of positive proof: but if the event be such that its occurrence must necessarily have rendered the title different from that stated, the purchaser is entitled to require some evidence from which its absence may reasonably be inferred. For example, if it were stated in the abstract that A., a former owner, died leaving B., his only sister, his heiress-at-law, evidence must be given, not only that A. died on the date specified, that his father died before him, and that B. was the child of the same parents as A., but also that A. died intestate, that he left no issue, that he left no brother or any issue of any brother surviving him and that he had no other sister. The production of letters of administration is the evidence usually required on sales in proof of intestacy; facts like the want of issue or the number of children born of a marriage can only be inferred, after the death of the husband and wife, from a declaration by some member of the family or familiar friend that he never knew or heard of there being any issue, or more than certain specified children of the marriage; and such declarations are the evidence usually obtained (*f*). So where title was made under a voluntary settlement executed in 1845 on trust for the settlor for life and afterwards on trust for sale, but with a power of revocation, and under a conveyance after the settlor's death in execution of the trust for sale, it was admitted that the purchaser was entitled to proof, first, that the voluntary settlement had not been avoided by a subsequent conveyance for value, and secondly, that the power of revocation had never been exercised. But it was held that, there having been long possession in accordance with the alleged title, sufficient evidence was afforded by a declaration of the settlor's solicitor that he believed that the property remained in the settlor's possession till his death, and that he (the solicitor) had never heard of any sale of the property or of any exercise of the power of revocation (*g*). And it was further considered that, apart from this declaration, the necessary evidence was afforded by a recital in the conveyance made after the settlor's death that the property had been sold by auction pursuant to the trust for sale; the truth of

affected the title, did not happen.

(*f*) See *Doe* d. *Banning* v. *Griffin*, 15 East, 293, 294, n.; *Greaves* v. *Greenwood*, 2 Ex. D. 289; *Re Jackson*, 1907, 2 Ch. 354.
(*g*) *Re Marsh and Earl Granville*, 24 Ch. D. 11, 19.

which the purchaser was bound to assume under the stipulation making recitals in deeds twenty years old *primâ facie* evidence of the facts recited (*h*). This case appears to show that, whenever a power of appointment has been created, and title is deduced as in default of appointment, the purchaser is entitled to require evidence from which it may reasonably be inferred that the power was never exercised. But where the cesser of a power, as by the death of the donee thereof, is clearly shown, long possession and conveyance for value under the title in default of appointment are of themselves facts raising a presumption that the power was never exercised; and it seems that, in such circumstances, the purchaser must allow due weight to this presumption, and cannot require other evidence beyond what is in the vendor's possession or power or is afforded by his statutory declaration (*i*).

Rule as to presumptions of fact.

Here we may state the general rule with respect to presumptions of matters of fact on sales; which is, that the purchaser is bound to presume whatever a judge would at law direct the jury to presume, but not matters which the judge would leave to the jury to pronounce on the effect of the evidence (*k*). For example, a purchaser may be required to presume, after long possession of lands in accordance with the beneficial title, that some bare legal estate, which was previously outstanding and ought to have been assured to the beneficiaries, was duly conveyed to them, although no such conveyance can be found (*l*). But the

(*h*) *Re Marsh and Earl Granville,* 24 Ch. D. 11, 19; see below, p. 125.

(*i*) 1 Dart, V. & P. 328, 329, 5th ed.; 372, 373, 6th ed.; 366, 367, 7th ed.

(*k*) *Hillary* v. *Waller,* 12 Ves. 239, 254, 270; *Emery* v. *Grocock,* 6 Madd. 54, 57; Sug. V. & P. 399; 1 Dart, V. & P. 327, 333, 5th ed.; 371, 377, 6th ed.; 365, 371, 7th ed.; Fry, Sp. Perf. §§ 890, 891.

(*l*) See *England* d. *Syburn* v. *Slade,* 4 T. R. 682; *Doe* d. *Bowerman man* v *Sybourn,* 7 T. R. 2; *Wilson* v. *Allen,* 1 J. & W. 611, 614-620; *Cooke* v. *Soltau,* 2 S. & S. 154; *Clippens Oil Co.* v. *Edinburgh, &c. Trustees,* 1904, A. C. 64; and cases cited in previous note; Taylor on Evidence, §§ 113-121, 5th ed. This presumption arises where there is a special trust for trustees *to convey* to some beneficiary; see the first three cases above cited. But in the case of a *simple* trust for one in fee, it is consistent with the trust that the beneficiaries should be in possession and the trustee remain seised of the legal estate; it seems, therefore, that no presumption arises from these facts alone that the legal estate has been conveyed to the beneficiaries; see *Goodright* v. *Swymmer,* 1 Keny. 385; *Keene* v. *Deardon,* 8 East, 248; Sug. V. & P. 399, n. (*l*). It appears, however, that, where the property has long been dealt with by the beneficiaries on the footing that the parties so dealing are completely entitled to it, both at law and in equity, a conveyance of the outstanding legal estate will be presumed; *Emery*

Presumption of conveyance in case of trust to convey—Of simple trust.

Court will not oblige a purchaser, who has notice of some equitable incumbrance affecting the property sold, to take a title depending on the fact that the vendor bought without notice of such incumbrance (*m*).

Events of which the happening may or may not have affected the title.

Besides events, which would certainly affect the title, if they occurred, there are other events, the happening of which might or might not affect the title. An instance of this is the marriage of a vendor since the conveyance of the property to him or her, when a marriage settlement may or may not have been made, and, if made, may or may not have affected the property sold. It is conceived that the vendor is, as a rule, bound to answer all questions relevant to the abstracted title, that is, the title he is offering for the purchaser's acceptance (*n*); and he must

Whether a trustee's legal estate can be barred by the Statute of Limitations.

v. *Grocock, Cooke* v. *Soltau,* ubi sup.; and see *Philipps* v. *Halliday,* 1891, A. C. 228, 231; *Hulbert* v. *Dale,* 1909, 2 Ch. 570, 578; *Foley's Charity Trustees* v. *Dudley Corpn.,* 1910, 1 K. B. 317. It may be mentioned here that where the trustee under a simple trust has put the *cestui-que-trust* into possession, the legal estate of the trustee can not be barred under the Statutes of Limitations so long as the *cestui-que-trust's* possession and acts are consistent with the continuance of the trust; see stat. 3 & 4 Will. IV. c. 27, s. 7; *Garrard* v. *Tuck,* 8 C. B. 231, 251-254; *Malling* v. *Leake,* 16 C. B. 652; *Drummond* v. *Sant,* L. R. 6 Q. B. 763, 767, 768; *Warren* v. *Murray,* 1894, 2 Q. B. 648; *East Stonehouse Urban Council* v. *Willoughby Bros., Ld.,* 1902, 2 K. B. 318. But if the *cestui-que-trust* should deal with the property in such a way as to indicate an intention to hold adversely to the trustee's interest—as where the beneficiary deals with the legal estate in the land by letting, mortgaging or selling it as if he himself were seised of it, and without regard to the trustee's outstanding estate —it appears that in such case the trustee's estate *may* be barred and extinguished under the Statutes of Limitations after the time necessary to effect this result has expired; see an article by the late Mr. Charles Sweet in 30 L. Q. R. 158; *Re Cusson's, Ltd.,* 73 L. J. Ch. 296, and Mr. Sweet's comment on that case, 30 L. Q. R. 164.

(*m*) *Freer* v. *Hesse,* 4 De G., M. & G. 495; *Nottingham Patent Brick and Tile Co.* v. *Butler,* 16 Q. B. D. 778, 787, 789, 790.

(*n*) Sug. V. & P. 415, 416; 1 Dart, V. & P. 328, 329, 5th ed.; 372, 373, 6th ed.; 366, 367, 7th ed. It is submitted that the case of *Re Ford and Hill,* 10 Ch. D. 365, contains nothing contrary to this proposition. It was there held that a vendor is not bound to answer the requisition—"Is there to the knowledge of the vendor or his solicitor any settlement, deed, fact, omission or any incumbrance affecting the property not disclosed by the abstract"? The Court considered that such a requisition is in fact an interrogatory searching into matters beyond the vendor's duty of furnishing and verifying an abstract of title. Considering the established practice of not abstracting purely equitable charges (above, pp. 101-103), it seems obvious that this is a correct view. The vendor in delivering an abstract offers the abstracted title as a good title; and if it appears so to the purchaser's advisers, it seems not unreasonable to preclude them from requiring the vendor to set forth generally whatever else he may know about the title. But to require him to answer all questions relevant

Re Ford and Hill.

therefore answer the question whether a particular event, which might or might not have affected the title, has happened. If the answer be that the event has not happened, it does not appear that the purchaser can in general require any further evidence: though it seems he may call upon the vendor to make (at the purchaser's expense, according to the present rule (*o*)) a statutory declaration of the fact. If the vendor reply that the event happened but did not affect the property sold, the purchaser may require this statement to be confirmed by the production of any evidence in the vendor's possession or power, as well as to be embodied in a statutory declaration: but he cannot, it seems, insist on the production of other evidence (*p*). If the purchaser be informed of the existence of a document, such as a vendor's marriage settlement, which may or may not affect the property sold, and is also told that it did not affect the property sold, he is not fixed with notice of any equitable interest created by the document in the property sold (*q*). But as this is no protection to the purchaser against any legal estate or interest limited by such document in the property purchased, he should of course require the document, if in the vendor's possession or power, to be produced for his solicitor's examination (*r*).

Expense of proof of facts.

At common law the vendor was bound to procure at his own expense the evidence necessary to prove all the facts stated in the abstract (*s*): but under the Conveyancing Act, 1881 (*t*), the purchaser, in the absence of stipulation to the contrary, has to bear the expenses of searching for and procuring all such evidence, which is not in the vendor's possession. As has been previously remarked (*u*), this enactment does not discharge the

to the *abstracted* title is an entirely different thing; that does not go beyond requiring him to prove the title which he offers.

(*o*) Above, p. 107.

(*p*) 1 Dart, V. & P. 328, 329, 5th ed.; 372, 373, 6th ed.; 366, 367, 7th ed.

(*q*) *Jones* v. *Smith*, 1 Ph. 244, 253; *English and Scottish Mercantile Investment Co.* v. *Brunton*, 1892, 2 Q. B. 1, 700.

(*r*) 2 Dart, V. & P. 876, 5th ed.; 986, 6th ed.; 895, 7th ed. The purchaser cannot require any abstract or copy of such document to be made.

(*s*) Sug. V. & P. 417, 420, 431.

(*t*) Stat. 44 & 45 Vict. c. 41, s. 3 (6, 9); *Re Conlon and Faulkener's Contract*, 1916, 1 I. R. 241; *Re Wright and Thompson's Contract*, 1920, 1 Ch. 191.

(*u*) Above, p. 112.

vendor from his obligation of procuring proper evidence of the facts, if he have not any evidence in his possession; it merely exonerates him from the expense of so doing.

Recitals and statements of *facts, matters and parties* in documents twenty years old.

There are, however, certain facts, of which a purchaser is not entitled (except by special stipulation) to require proof, unless he can show ground for discrediting the statements in the abstract. Under the Vendor and Purchaser Act, 1874 (*x*), it is a term of every contract of sale of land, in the absence of stipulation to the contrary, that recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions (*y*). And by the Conveyancing Act, 1881 (*z*),

(*x*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 2). It had been usual for several years previously for vendors to make special stipulations to the same effect: Juridical Society Papers, ii. 589 *sq.*; 1 Davidson, Prec. Conv. 556, 609, 4th ed.; 1 Dart, V. & P. 147, 148, 5th ed.; Williams, Real Prop. 451, 13th ed. The old practice of conveyancers, in the absence of special stipulation, was to dispense with evidence of facts recited in deeds upwards of thirty years old, when there had been uninterrupted possession in accordance with the recitals, and under the deeds containing them, and where there were corroborative circumstances strengthening the presumption that the facts agreed with the recitals: 1 Jarm. Conv. 3rd ed. by Sweet, 121; Coventry, Conv. Ev. 317; see *Fort* v. *Clarke*, 1 Russ. 601.

Criticism of *Bolton* v. *London School Board.*

(*y*) In *Bolton* v. *London School Board*, 7 Ch. D. 766, Malins, V.-C., decided that a recital that *S. Walker*, a former owner of land contracted to be sold, was seised thereof in fee simple, contained in a deed dated twenty-five years before the contract, was by the above enactment rendered evidence that *S. Walker* was so seised until the contrary were shown by the purchaser, and that the vendors were therefore discharged from the obligation of showing a forty years' title. It is submitted that this decision is clearly wrong. First, the law, as we have seen, allows a vendor to discharge his obligation of showing a good title by proof of forty years' title, that is, of forty years' *seisin in fee* by himself and his predecessors in title; above, p. 99. How can this obligation possibly be discharged by proof that one of such predecessors was seised in fee twenty-five years before the contract? Secondly, assuming that the recital must be accepted as evidence of the fact stated, it apparently alleged nothing but a seisin in fee and made no assertion that the land was free from incumbrances (see *Nott* v. *Riccard*, 22 Beav. 307). Mere seisin in fee is perfectly compatible with the existence of a long term of years granted to other persons at a nominal rent to secure either their beneficial occupation or money advanced; and it seems that on this ground the purchaser was plainly entitled to forty years' title, the very object of allowing the investigation of title for forty years past being to enable the

(*z*) Stat. 44 & 45 Vict. c. 41, s. 3 (3).

Recitals of documents forming part of the title prior to the time for commencing the abstract.

the purchaser is required to assume, unless the contrary appear, that the recitals contained in the abstracted instruments of any deed, will or other document forming part of the title prior to the time prescribed by law or stipulated for commencement of title, are correct and give all the material contents of the deed, will or other documents so recited, and that every document so recited was duly executed by all necessary parties and perfected, if and as required, by fine, recovery, acknowledgment, enrolment or otherwise.

Recitals no evidence as a rule.

As a rule, recitals and other statements in deeds are no evidence at all of the facts recited (*a*), and are only available as evidence in courts of justice either by way of estoppel at law (*b*) or as admissions (*c*) of a party (*d*) who executed the deed (*e*). They may therefore be evidence against but not for a party to the deed (*f*). But owing to the exceptional rule regarding the admission in evidence of statements made *ante litem motam* by a deceased member of a family on matters of pedigree, statements on such matters so made by way of recital in a deed executed by such a person may be received in evidence after his death (*g*). The only instance of a recital affording

purchaser to ascertain, on an inspection of *all* the transactions during that period, that no incumbrances have been created which hinder the vendor from conveying what he contracted to sell. Besides, no one would contend that a vendor shows a forty years' title if he begin the abstract with a deed of conveyance, twenty-five years old, expressly limiting the land to one of his predecessors in fee; and it seems utterly absurd, if this be so, that a mere recital, in the same deed, of the grantor's seisin in fee should avail to deprive the purchaser of his right to investigate the earlier title. In *Re Wallis and Grout's Contract*, 1906, 2 Ch. 206, 210, the reasons here given (as stated in the first edition of this book, p. 109) were approved of by Swinfen Eady, J., who expressed his concurrence in the writer's conclusion. As to the application of rule 2 of the V. & P. Act, 1874, s. 2, to *documents* recited in a deed twenty years old, see above, p. 104, n. (*l*).

Documents recited in deeds twenty years old.

(*a*) *Bristow* v. *Cormican*, 3 App. Cas. 641, 653, 662.

(*b*) *Baker* v. *Dewey*, 1 B. & C. 704; *Harding* v. *Ambler*, 3 M. & W. 279; and see 8 M. & W. 212. This kind of estoppel by deed has become comparatively unimportant since law and equity have been administered in the same Courts under the Judicature Acts of 1873-5, as there was no such estoppel in Courts of Equity; *Coppin* v. *Coppin*, 2 P. W. 291; *Wilson* v. *Keating*, 28 L. J. Ch. 895.

(*c*) *Carpenter* v. *Buller*, 8 M. & W. 209; Taylor, Evidence, §§ 84, 85, 653 *sq.*, 5th ed.; Stephen, Evidence, Arts. 15 *sq.*

(*d*) *Fort* v. *Clarke*, 1 Russ. 601.

(*e*) *Tull* v. *Owen*, 4 Y. & C. 192.

(*f*) *Doe* d. *Pritchard* v. *Dodd*, 2 Nev. & Man. 838, 845; *Re Holland*, 1902, 2 Ch. 360, 379, 380.

(*g*) *Welcome* v. *Upton*, 6 M. & W. 536, 539; *Doe* d. *Jenkins* v. *Davies*, 10 Q. B. 314.

good evidence for all purposes is a recital in a public (*h*) Act of Parliament. This is held to be admissible, though not conclusive (*i*) proof of the facts recited, on the ground that it is not to be supposed that a statute, which is made by the sovereign authority of the realm, would contain an untrue statement (*k*). Statements of fact contained in what are called public documents are admissible as evidence of the facts so stated; and for this purpose public documents are those made by some public officer in pursuance of a judicial or *quasi*-judicial duty to inquire as to the facts and either for the purpose of the public (*l*) making use of and having access to the documents, or for the information of the Crown in some matter which affects the property or revenues of the Crown, and is thus a matter of public interest (*m*). Statutory declarations of a member of the family

Recital in a public statute.

Statements of fact in public documents.

Statutory declarations.

(*h*) A recital in a private Act of Parliament is not, as a rule, evidence of the fact recited: *Brett* v. *Beales*, M. & M. 421; *Beaufort* v. *Smith*, 4 Ex. 450; *The Shrewsbury Peerage*, 7 H. L. C. 1; *Cowell* v. *Chambers*, 21 Beav. 619; cf. Joyce, J., *A.-G.* v. *Foundling Hospital*, 1914, 2 Ch. 154, 170, 171 (*sed qu.*).

Recital in private Act.

(*i*) *R.* v. *Greene*, 6 A. & E. 548.

(*k*) Co. Litt. 19 b; *R.* v. *De Berenger*, 3 M. & S. 67, 69; *R.* v. *Sutton*, 4 M. & S. 532, 542.

(*l*) It appears that the officer need not be an officer of the Crown, and the document need not be made for the information of all the King's subjects, but may be public if made for the use of some class of them; see Blackburn, L. A., *Sturla* v. *Freccia*, 5 App. Cas. 623, 643, 644; Taylor, Evidence, §§ 1429-1433, 5th ed.

(*m*) *Rowe* v. *Brenton*, 8 B. & C. 732, 743, 744 (caption of seisin to the use of the Duke of Cornwall by persons assigned by *him* to do so admitted on the ground of the interest of the Crown and therefore of the public in the Duchy and its revenues); *Evans* v. *Taylor*, 7 A. & E. 617 (statements contained in a survey, which was made under statutory authority, but relating to matters outside the scope of the duty of inquiry, rejected); *Irish Society* v. *Bishop of Derry*, 12 Cl. & Fin. 641, 668, 669 (entry in one of the books of the First Fruits Office received); *Shrewsbury Peerage Case*, 7 H. L. C. 1, 20, 21, 24, 25 (books from the Heralds' College admissible, if containing information obtained on the Heralds' visitations, but otherwise not; see 5 App. Cas. 644, 645); *Queen's Proctor* v. *Fry*, 4 P. D. 230 (records of marriages and baptisms kept by order of the Government of India receivable); *Manchester Corporation* v. *Lyons*, 22 Ch. D. 287, 299 (inquisition as to manorial rights directed to justices of the Duke of Lancaster at a time when he had sovereign rights in the Duchy, admitted); *Sturla* v. *Freccia*, 5 App. Cas. 623, 643, 644 (statements as to the place of birth and the age of one Mangini contained in the report of a committee of a public department of a foreign state, directed to inquire as to his fitness for a diplomatic post, rejected, and a general rule laid down by Lord Blackburn); *Neill* v. *Devonshire*, 8 App. Cas. 135, 183-186 (inquisitions on attainder and *post mortem* admitted, also the decree in a possessory suit in the Irish Court of Chancery); *Evans* v. *Merthyr Tydfil, &c. Council*, 1899, 1 Ch. 241, 250, 252 (survey of Crown lands made in pursuance of a statutory duty, admitted); *Lyell* v. *Kennedy*, 14 App. Cas. 437 (extracts from

as to matters of pedigree are admissible in evidence after the deponent's death, if they were made before any controversy had arisen as to the facts deposed to (*n*). But with this exception, statutory declarations as to matters of title are not admissible as evidence in litigation (*o*), unless against the deponent, or his privies in estate, blood or law as an admission by him (*p*), or after the deponent's death as a statement (if so made) either against his pecuniary or proprietary interest, or in the course of his business or professional duty, or as to public or general rights (*q*). A recital of a document in a deed operates as an admission of the existence and due execution of the recited document by a party to the deed containing the recital, who has executed and taken some benefit under the deed (*r*): but such a recital is not, generally speaking, any evidence of the exis-

Recitals in deeds of other documents—

parish registers kept under public authority in Scotland, received); *Re Goodrich,* 1904, P. 138 (entry in a register of births made under stat. 6 & 7 Will. 4, c. 86, admitted as evidence of the actual date of birth); *Mercer* v. *Denne,* 1904, 2 Ch. 534, 541, 544-546; 1905, 2 Ch. 538, 555-558, 561, 564, 568 (reports made in 1610 by a surveyor by order of the Lord Warden of the Cinque Ports as to repairs made necessary to Walmer Castle by encroachments of the sea, and an estimate made by the King's engineer for reparation of Walmer Castle, all produced from the Record Office, and maps and plans prepared by direction of the Board of Ordnance in 1641, 1644 and 1647 and produced from the War Office, rejected as having been made for private information and temporary purposes; chart made by a private person, but in possession of the Admiralty, rejected; charts made by direction of the Admiralty for the use of the navy and merchants, admitted; and Lord Blackburn's rule in *Sturla* v. *Freccia* discussed); and see Taylor, Evidence, §§ 1429-1433, 5th ed.; Stephen, Evidence, Art. 34; *Copestake* v. *West Sussex County Council,* 1911, 2 Ch. 331 (tithe-map rejected as evidence of extent of public right of way); *A.-G.* v. *Horner* (No. 2), 1913, 2 Ch. 140, 153-156 (old maps not being public documents, rejected); *Fowke* v. *Bevington,* 1914, 2 Ch. 308 (17th century county survey, not being a public document, rejected); *Clode* v. *London County Council,* 1914, 3 K. B. 852, 1915, A. C. 947, 954 (maps, not being public documents, rejected); *Collis* v. *Amphlett,* 1918, 1 Ch. 232 (as to the evidence afforded by an award map made under Commons Act, 1876); *Brierley* v. *Brierley,* 1918, P. 257 (entry in register of births admitted as *primâ facie* evidence of date of birth).

(*n*) *Berkeley Peerage Case,* 4 Camp. 401; *Reilly* v. *Fitzgerald,* Dru. 122; *Gee* v. *Ward,* 7 E. & B. 509; *Shedden* v. *Patrick,* 2 Swa. & Tr. 187; Sug. V. & P. 418; Hubback, Ev. Succ. 68, 69; Taylor, Evidence, §§ 571 *sq.,* 5th ed.; Stephen, Evidence, Art. 31.

(*o*) Hubback, Ev. Succ. 66, 67.

(*p*) Taylor, Evidence, §§ 653 *sq.,* 712 *sq.,* 5th ed.; Stephen, Evidence, Arts. 15, 16.

(*q*) Taylor, Evidence, §§ 543 *sq.,* 602 *sq.,* 630 *sq.,* 5th ed.; Stephen, Evidence, Arts. 25, 27, 28, 30.

(*r*) *Burnett* v. *Lynch,* 5 B. & C. 589, 601; *Bringloe* v. *Goodson,* 5 Bing. N. C. 738.

tence or execution of the recited document, or of its contents, as against other persons (*s*). And even against parties to the deed, the recital is not evidence of any part of the contents of the recited documents, beyond what is recited (*t*). But if it has been proved that a document recited in a deed has been lost, the recital may be good secondary evidence of the lost document, when there has been long uninterrupted possession in accordance therewith (*u*).

May be evidence, if the document be lost.

Apart from the stipulation now incorporated in contracts as above mentioned (*x*) by the Vendor and Purchaser Act, 1874, and except so far as recitals or statements are evidence admissible in litigation, the vendor's obligation to furnish evidence of all facts material to the title (*y*) is in no way discharged by reason of any such facts being stated or recited in deeds or other instruments appearing on the abstract (*z*). But conveyancers can generally accept statutory declarations made on some previous sale and produced by the vendor from among the muniments of title as evidence of the facts deposed to therein; as, if there be no reason to suspect the authenticity of the declaration and the facts asserted are such as are usually proved on sales by statutory declaration, a new statutory declaration would seldom afford better evidence than an old one. And, as we have seen, in some cases an old statutory declaration may have become good evidence through the death of the deponent.

Recitals of facts do not excuse vendor from proof

Now that the purchaser is, as a rule, bound to pay the expense of procuring all evidence necessary to verify the abstract but not in the vendor's possession (*a*), his natural endeavour is to obtain satisfactory proof at the least cost to himself. Hence it frequently happens in practice that a purchaser accepts irregular

Acceptance of irregular evidence.

(*s*) *Moulton* v. *Edmonds*, 1 De G., F. & J. 246, 251; Burton, Comp. pl. 480; *Re Wallis and Grout's Contract*, 1906, 2 Ch. 206; see above, p. 125, n. (*y*).
(*t*) *Gillett* v. *Abbott*, 7 A. & E. 783.
(*u*) *Moulton* v. *Edmonds*, 1 De G., F. & J. 246, 252.
(*x*) Above, p. 125.
(*y*) Above, p. 106.
(*z*) 1 Jarm. Conv. 3rd ed. by Sweet, 120; 1 Dart, V. & P. 328, 5th ed.; 372, 6th ed.; 377, 7th ed.; Williams, Real Prop. 451, 13th ed.
(*a*) For many years before the commencement of the Conveyancing Act, 1881, it was usual for vendors to stipulate specially that the purchaser should bear this expense; Juridical Society Papers, ii. 589, 590; 1 Davidson, Prec. Conv. 506, 555, 609, 4th ed.

evidence—evidence which he could not be required to accept—to save himself the expense of the regular mode of proof. Great caution should always be observed in admitting such proof. It is true that if any fact on which title depends be established, the purchaser may suffer no inconvenience from not having the regular conveyancing evidence in his possession. If he sell, the purchaser from him will by the rule be at the cost of procuring it. But if a fact admitted on irregular evidence be not verifiable by regular evidence, the purchaser may obviously find himself at a serious disadvantage on a re-sale. As an example of the reception of irregular evidence, where a man's death is the fact to be proved, a purchaser may, it is conceived, usually rest satisfied with production of the probate of his will or of letters of administration to his effects (*b*), or even of the receipts for succession duty paid as on his death. Indirect evidence of this kind is often to be found in the vendor's possession, and may save the expense of getting a certificate. In this case it will be observed that the fact of death is inferred, not only from the presumption that things are rightly done (*c*), but also from the fact that the survivors have done an act against their own interest in paying death duty; and such payment and the granting of probate or administration are acts extraneous to the title. Again, the presumption that things are rightly done is greatly strengthened whenever valuable consideration has been given on the faith of certain events having taken place. Thus if the death of a joint mortgagee be stated, and it appear that, on a subsequent transfer or purchase, a conveyance has been accepted from the surviving mortgagees as having become entitled in consequence of his death, it is hardly a rash assumption that the death took place as alleged. But it would not be advisable to dispense with proof of the alleged recent death of a trustee merely because in a subsequent deed a new trustee is appointed as upon his death. In this case no act extraneous to the title has been done on the faith of the event in question having occurred. Another instance in which indirect evidence may be accepted is that of a document, which created an equitable charge, being found in the possession of the person, who gave the charge, or persons claiming under him. In such case it may

Indirect evidence of death.

Indirect evidence of payment off of equitable charge.

(*b*) Coventry, Conveyancers' Evidence, 278, 279; Sug. V. & P. 418.
(*c*) Above, p. 108.

be presumed that the charge was paid off, although no receipt for the amount secured be endorsed on the document (*d*).

Great importance of the verification of the abstract.

The extreme importance of the proper verification of the abstract is too often overlooked. The abstract being the chief document delivered and the only document laid before and commented on by counsel, there is always a certain danger of losing sight of the fact, that *the most perfect abstract is no evidence at all of title*. It is only when we turn away from the abstract to the verification of it that the real proof of title begins. The most severe scrutiny of the abstract may be utterly useless if the purchaser's advisers are lax in exacting or examining the evidence in support of it. Extreme care should therefore be observed in dispensing with any of the evidence regularly necessary to verify the abstract; and if it be proposed to accept any irregular or indirect evidence, the conveyancer should weigh well the reasons why the same may be regarded as affording substantial proof.

Importance of the examination of the title-deeds with the abstract.

It seems needless but is really very necessary to point out that no part of the verification of the abstract is more important than the examination of the title-deeds. This is especially the case at the present day, when abstracts are constantly delivered, which have been drawn in the most slovenly and unskilled manner. This fact enhances the necessity of Lord St. Leonards' emphatic warning, that the examination of the title-deeds with the abstract should never be left to an incompetent person (*e*). As Mr. Dart pointed out, it is a duty requiring the most scrupulous care, the object of the examination being four-fold: to ascertain, first, that what has been abstracted is correctly abstracted; secondly, that what is omitted is clearly immaterial; thirdly, that all the documents are perfect as respects execution, attestation, endorsed receipts, registration, stamps, &c.; and fourthly, that there are no endorsed notices, nor any circumstances attending the mode of execution or attestation, &c., which are calculated to excite suspicion (*f*). Every part of every document, especially of a will, should be read through (*g*). And very

(*d*) *Nicoll* v. *Chambers*, 11 C. B. 996, 1004; *Farmer* v. *Turner*, 15 Times L. R. 922; 1 Dart, V. & P. 324, 5th ed.; 367, 6th ed.; 361, 7th ed.
(*e*) Sug. V. & P. 411.
(*f*) 1 Dart, V. & P. 415, 5th ed.; 480, 6th ed.; 493, 7th ed.
(*g*) Ibid.; Sug. V. & P. 411.

particular attention should be given to the execution of the documents; for, as we have seen (*h*), it is not the practice on sales to require any other evidence of the execution of the documents of title than is apparent on the documents themselves.

Proof of identity of property.

Besides verifying the documents and facts stated in the abstract, the vendor is bound, in the absence of special stipulation, to prove the identity of the property described in the contract for sale with that specified in the title-deeds (*i*). The requisite evidence of identity is usually obtained from ancient plans, leases, extracts from parish and land-tax books, and statutory declarations of old people (*k*). It is, however, a common stipulation in contracts for sale of land that the purchaser shall admit the identity of the property purchased with that comprised in the muniments offered by the vendor as the title to such property upon the evidence afforded by a comparison of the descriptions contained in the particulars of sale and in the muniments (*l*). This condition deprives the purchaser of his right to require independent evidence of identity: but it does not exonerate the vendor from proving identity as part of his obligation to show a good title. If therefore a comparison of the descriptions in the title deeds with the description in the contract afford no evidence that the property purchased is the same as or is part of the property to which the deeds relate, the vendor cannot force the title on the purchaser without giving further evidence of identity (*m*).

Evidence of particular matters.

It may be convenient to consider the various matters, of which proof is generally required on sales, in alphabetical order as follows:—

Acknowledgment.

Acknowledgment of a deed by a married woman under stat. 3 & 4 Will. IV. c. 74:—proved, if the deed were executed before the 1st of January, 1883, by the memorandum of acknowledg-

(*h*) Above, p. 108.
(*i*) Above, p. 33.
(*k*) 1 Davidson, Prec. Conv. 557, 4th ed.; 463, 5th ed.
(*l*) 1 Davidson, Prec. Conv. 610 and n., 4th ed.; 520, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 262, 4th ed.; 275, 10th ed.; above, pp. 59, 66.
(*m*) *Flower* v. *Hartopp*, 6 Beav. 476; *Curling* v. *Austin*, 2 Dr. & Sm. 129; and see Sug. V. & P. 26; 1 Dart, V. & P. 153, 154, 5th ed.; 174, 175, 6th ed.; 170, 7th ed.; and Chap. VI., below.

ment in the proper form endorsed on or written at the foot or in the margin of the deed, and an office copy of the certificate of acknowledgment (*n*), the filing of which was essential (*o*); if the deed were executed on or after the 1st of January, 1883, by a memorandum only in the proper form endorsed on or written at the foot of or in the margin of the deed and purporting to be signed by a person authorized to take the acknowledgment (*p*).

Act of Parliament.

Act of Parliament. A public Act needs no proof, the Court taking judicial notice of public Statutes (*q*). A private Act is proved by a copy thereof purporting to be printed by the King's printers (*r*), or by a copy thereof proved to have been examined with the Parliament Roll (*s*).

Award of enfranchisement.

Award of enfranchisement. If made under the Copyhold Act, 1858, proved by a copy thereof purporting to be sealed or stamped with the seal of the Copyhold Commissioners (*t*). If made under the Copyhold Act, 1887, proved in the same way or by a copy of the entry directed to be made of the award in the court rolls of the manor (*u*). The Copyhold Act, 1894 (*x*), repealed, without re-enacting, the section of the Act of 1852 (*y*) which made awards provable by such evidence in courts of justice. But similar evidence of awards of enfranchisement made under the Act of 1894 (*z*) would appear to be receivable by conveyancers on a sale.

(*n*) Stats. 3 & 4 Will. IV. c. 74, ss. 84—88; 4 & 5 Will. IV. c. 92, ss. 75—79, as to Ireland; 45 & 46 Vict. c. 39, s. 7 (8).

(*o*) *Jolly* v. *Handcock*, 7 Ex. 824.

(*p*) Stat. 45 & 46 Vict. c. 39, s. 7, and Rules thereunder; see Williams's Conveyancing Statutes, 281, 477.

(*q*) *R.* v. *Sutton*, 4 M. & S. 532, 542.

(*r*) Stat. 8 & 9 Vict. c. 113, s. 3.

(*s*) Taylor on Evidence, § 1368, vol. ii. p. 1315, 5th ed.; and see Coventry, Conveyancers' Evidence, 81; Burt. Comp. pl. 482; above, p. 112.

Land Commissioners. Board of Agriculture.

(*t*) After the year 1882, the Copyhold Commissioners were styled the Land Commissioners, and on the 12th August, 1889, their powers and duties were transferred to the Board of Agriculture; stats. 45 & 46 Vict. c. 38, s. 48; 52 & 53 Vict. c. 30, s. 2; see note (*z*), below.

(*u*) See stats. 15 & 16 Vict. c. 51, s. 49; 21 & 22 Vict. c. 94, s. 10; 50 & 51 Vict. c. 73, s. 22.

(*x*) Stat. 57 & 58 Vict. c. 46, s. 100.

(*y*) Stat. 15 & 16 Vict. c. 51, s. 49.

(*z*) Under this Act, 57 & 58 Vict. c. 46, s. 10 (1, 5), enfranchisement is made by an award confirmed by the Board of Agriculture, who are to send a copy of the confirmed award sealed or stamped with the seal of the Board to the lord, and the lord is to "cause the copy to be entered in the court rolls of the manor." Under stat. 52 & 53

Award of inclosure.

Award as to the inclosure of common lands made under an Act incorporating the Inclosure Consolidation Act, 1801, or other special Inclosure Act. Proved by a copy or extract signed by the proper officer of the Court, if the award were enrolled in one of the Courts of Westminster, or, if the award were enrolled with the clerk of the peace for the county in which the lands lie, by the clerk or his deputy, and purporting to be a true copy (*a*).

Award under General Inclosure Act, 1845.

Award as to inclosure of common lands made under the General Inclosure Act, 1845. Proved by a copy purporting to be sealed with the seal of the Board of Commissioners under the Act (*b*), or by a copy or extract signed by the clerk of the peace of the county in which the lands lie, or his deputy, purporting the same to be a true copy (*c*).

Bankruptcy.

Bankruptcy, proceedings in. Provable in litigation in the same manner as other proceedings in *Courts* (*q.v.*), and also by copies certified as required by the various Bankruptcy Acts (*d*). Under the Bankruptcy Act, 1914, as under the Act

Vict. c. 30, s. 7, every document purporting to be an order, licence, or other instrument issued by the Board of Agriculture, and to be sealed with the seal of the Board, authenticated by the signature of the president or some member of the Board, or the secretary or some person authorized by the president to act on behalf of the secretary, or purporting to be signed by a secretary, or any person authorized by the president to act on behalf of the secretary, shall be received in evidence and be deemed to be such order, licence or instrument, without further proof unless the contrary is shown. The Board of Agriculture was styled the Board of Agriculture and Fisheries by stat. 3 Edw. VII. c. 31, s. 1 (1), passed 14th August, 1903; and by stat. 9 & 10 Geo. V. c. 91, s. 1 (1), passed 23rd December, 1919, the Ministry of Agriculture and Fisheries was substituted for that Board, and any reference in any Act or document to that Board or to the President of that Board is to be construed as a reference to the Minister or the Ministry of Agriculture and Fisheries, as the context shall require. So that the provisions above stated must now be construed accordingly.

Board of Agriculture and Fisheries.

Ministry of Agriculture and Fisheries.

(*a*) Stats. 41 Geo. III. c. 109, s. 35; 3 & 4 Will. IV. c. 87, s. 2.

(*b*) These Commissioners were first styled the Inclosure Commissioners for England and Wales; after 1882 they were styled the Land Commissioners; and on the 12th August, 1889, their powers and duties were transferred to the Board of Agriculture, since styled the Board of Agriculture and Fisheries, and now replaced by the Ministry of Agriculture and Fisheries; stats. 8 & 9 Vict. c. 118, s. 2; 45 & 46 Vict. c. 38, s. 48; 52 & 53 Vict. c. 30, s. 2; note (*z*) to p. 133, above.

Inclosure Commissioners.

Land Commissioners.

(*c*) Stat. 8 & 9 Vict. c. 118, ss. 2, 146.

(*d*) Stats. 4 & 5 Geo. V. c. 59, ss. 139, 142; 46 & 47 Vict. c. 52, ss. 134, 137; 32 & 33 Vict. c. 71, ss. 107—109; 24 & 25 Vict. c. 134, ss. 203 *sq.*; 12 & 13 Vict. c. 106, ss. 232 *sq.*; 1 & 2 Will. IV. c. 56, s. 29; 6 Geo. IV. c. 16, s. 97.

of 1883, a receiving order or an adjudication of bankruptcy is also conclusively proved by production of a copy of the *London Gazette* containing a notice thereof (*e*); the appointment of a trustee is proved by the certificate of appointment (*f*); and the proceedings at a statutory meeting of creditors are proved by a minute signed at the same or the next meeting by a person describing himself as or appearing to be the chairman of the meeting at which the minute is signed (*g*). On sales, office copies are accepted as evidence, whether receivable as evidence in Court, or not (*h*).

Copyholds.

Copyholds, assurances of. The law regards the court rolls of a manor as a public document (*i*), and so permits entries therein to be proved either by production of the rolls (*k*), by examined copies (*l*) or by copies signed by the steward (*m*), such as are always delivered to the tenants on the completion of a transaction acknowledging their title (*n*). According to the strict rule of the common law, the last-mentioned mode of proof was incomplete without evidence of the steward's handwriting, unless the copy were thirty years old at least (*o*) and came from the proper custody (*p*). But entries in court rolls are provable under the Evidence Act, 1851 (*q*), by copies *purporting* to be signed and certified as true copies by the officer to whose custody the originals are entrusted, that is, as a rule, the steward. On sales of copyholds, the assurances entered on the court rolls are usually proved by copies thereof signed by the steward, and it is not the practice to require any proof of the steward's handwriting (*r*), copies purporting to be signed by the steward being accepted as genuine, unless there be some reason for suspecting

Copies of Court rolls.

(*e*) Stats. 4 & 5 Geo. V. c. 59, s. 137; 46 & 47 Vict. c. 52, s. 132.
(*f*) Stats. 4 & 5 Geo. V. c. 59, s. 143; 46 & 47 Vict. c. 52, s. 138.
(*g*) Stats. 4 & 5 Geo. V. c. 59, s. 138; 46 & 47 Vict. c. 52, s. 133.
(*h*) Sug. V. & P. 417; 1 Dart, V. & P. 318, 5th ed.; 361, 6th ed.
(*i*) Taylor, Evidence, §§ 1433, 1438, 5th ed.
(*k*) *Doe* d. *Bennington* v. *Hall*, 16 East, 208.
(*l*) *Doe* d. *Cawthorn* v. *Mee*, 4 B. & Ad. 617; *Doe* d. *Burrows* v. *Freeman*, 12 M. & W. 844; *Breeze* v. *Hawker*, 14 Sim. 350.
(*m*) 1 Scriv. Cop. 590, 3rd ed.
(*n*) Williams, Real Prop. 375, 13th ed.; 527, 23rd ed.
(*o*) Above, p. 107.
(*p*) 1 Scriv. Cop. 591, 3rd ed.; 2 Wat. Cop. 39, n., 4th ed.; *Wynne* v. *Tyrwhitt*, 4 B. & Ald. 376.
(*q*) Stat. 14 & 15 Vict. c. 99, s. 14; Taylor, Evidence, §§ 1437, 1438, 5th ed.; above, p. 113.
(*r*) Sug. V. & P. 417; 1 Dart, V. & P. 310, 311, 5th ed.; 351, 6th ed.; 346, 347, 7th ed.

their authenticity (*s*). A vendor of copyholds is as a rule bound to procure proper copies of court roll signed by the steward for verification of the abstract; he cannot require the vendor to go and compare the abstract with the original rolls (*t*): but, under the Conveyancing Act, 1881 (*u*), the purchaser will be obliged to pay the expense of obtaining such copies, if not in the vendor's possession.

Courts, proceedings of.

Courts of justice, records and proceedings of. As a rule, these are provable in litigation (1) by production of the original, which is usually inconvenient; or (2) by an exemplification, or its equivalent; or (3) by an examined copy (*x*). As we have seen (*x*), a copy made by an officer of the Court *bound by law to make it* is equivalent to an exemplification: whilst office copies, or copies made by an officer of the Court who is authorised by rule of Court *but not required by law to make them,* are not at common law equivalent to an exemplification, save in the same Court *and cause,* in which *the proceeding* occurred (*y*). But office copies of all writs, records, pleadings and documents filed in the High Court of Justice are admissible in evidence to the same extent as the original (*z*). Besides the above modes of proof, there are various particular cases in which the proceedings of Courts are by Statute provable in litigation by copies certified as required by the Act (*a*). For example, proceedings in bankruptcy (*b*) and orders in lunacy (*c*) are now provable in this way. And under the Evidence Act, 1851 (*d*), the proceedings of courts of justice not provable by copies under any other Statute appear to be provable by certified copies (*e*). The

Office copies.

(*s*) See above, p. 108.

(*t*) Sug. V. & P. 431; 1 Dart, V. & P. 311, 5th ed.; 352, 6th ed.; 347, 7th ed., where it is submitted that the vendor will discharge his obligation, if he can produce the original rolls at the proper place for verification of the abstract, and satisfactorily account for the absence of the copies of court roll from time to time delivered to the tenants; above, p. 111.

(*u*) Stat. 44 & 45 Vict. c. 41, s. 3 (6).

(*x*) Above, p. 112.

(*y*) Taylor, Evidence, §§ 1378—1391, 5th ed.; Stephen, Evidence, Art. 78.

(*z*) R. S. C. 1883, Order 37, rule 4.

(*a*) Taylor, Evidence, §§ 1391 *sq.*, 1440, 5th ed.; Stephen, Evidence, Art. 79; above, pp. 112, 113.

(*b*) Stat. 4 & 5 Geo. V. c. 59, s. 139, replacing 46 & 47 Vict. c. 52, s. 134.

(*c*) Stat. 53 Vict. c. 5, s. 144.

(*d*) Stat. 14 & 15 Vict. c. 99, s. 14; above, p. 113.

(*e*) *Reeve* v. *Hodson,* 10 Hare, App. xix.

records of the Courts deposited in the Record Office are also provable as records under the charge of the Master of the Rolls (*f*). On sales, however, the practice is to accept office copies as evidence, whether the same would be receivable in evidence on litigation or not (*g*).

Crown grants.

Crown grants are proved by production of the original under the great seal, the privy seal or the royal sign manual; but as they are matters of public record, they are also provable by exemplifications or examined copies (*h*), or under the Evidence Act, 1851, by certified copies (*i*). But on sales, if the original be not forthcoming, it seems that the purchaser cannot require the vendor to furnish him with a copy in accordance with the general rule (*k*), but must examine the enrolment at his own expense (*l*).

Deeds.

Missing documents.

Deeds and private writings are, as we have seen (*m*), primarily proved on sales by production of the originals, and proof of execution or signature is not usually required. If any such document, which ought to be produced, be missing, its destruction or loss must be proved, either by evidence of actual destruction, or by showing that search has been made for it without result in all places where it is reasonably likely to have been deposited. If its destruction or loss be so established, secondary evidence may be given of its contents (*n*), such as a counterpart, draft, copy or abstract thereof proved to be correct (*o*), or a recital thereof in a subsequent instrument (*p*):

(*f*) See below; Taylor, Evidence, §§ 1337, 1338, 1377, 5th ed.

(*g*) Sug. V. & P. 417; 1 Dart, V. & P. 318, 5th ed.; 361, 6th ed.; 1 Davidson, Prec. Conv. 552, 4th ed.; 459, 5th ed.

(*h*) 2 Black. Comm. 346; Taylor, Evidence, § 1371, p. 1316; 5th ed.; above, p. 112.

(*i*) 1 Dart, V. & P. 315, 5th ed.; 361, 6th ed.; 357, 7th ed.; above, p. 113.

(*k*) Above, p. 112.

(*l*) Sug. V. & P. 431; 1 Dart, V. & P. 316, 5th ed.; 359, 6th ed.; 354, 7th ed.; 1 Davidson, Prec. Conv. 531, 4th ed.

(*m*) Above, p. 107.

(*n*) *Hart* v. *Hart*, 1 Hare, 1; *Fitzwalter Peerage*, 10 Cl. & Fin. 946, 952-3; *Green* v. *Bailey*, 15 Sim. 542; *Richards* v. *Lewis*, 11 C. B. 1035; *R.* v. *Saffron Hill*, 1 E. & B. 93; *Moulton* v. *Edmonds*, 1 De G., F. & J. 246, 251; Taylor, Evidence, §§ 398, 399, 5th ed.; Sug. V. & P. 437, 438; 1 Dart, V. & P. 142, 312, 5th ed.; 159, 353, 6th ed.; 155, 349, 7th ed.; 1 Davidson, Prec. Conv. 551, 4th ed.

(*o*) In litigation, when secondary evidence of the contents of a document is admitted, there is no question whether any particular kind of secondary evidence is better than another, and recourse may be had at once to oral evidence of the contents: *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102; Taylor, Evidence, § 495, 5th ed.; Stephen, Evidence, Art. 70.

(*p*) Above, p. 29; *Alexander* v. *Crosby*, 1 J. & L. 666.

but in such case the execution of the missing document must be duly proved (*q*). A missing document will be presumed to have been duly stamped, in the absence of anything to show the contrary (*r*).

Enrolment.

Enrolment. The proper evidence of the enrolment of any document required by Statute to be enrolled, as deeds of bargain and sale of any estate of inheritance in lands (*s*), conveyances to charitable uses (*t*) and disentailing assurances (*u*), depends generally on the terms of the particular Act. But where it is the practice to deliver back the original deed to the parties from the enrolment office with a memorandum of the enrolment endorsed thereon, and purporting to be made by the proper officer, and it is his duty to make the memorandum, such memorandum is at common law sufficient evidence of the enrolment, without proof of the officer's signature or official character (*x*). This is the case with respect both to deeds of bargain and sale enrolled (*y*) and conveyances to charitable uses (*z*). And by a statute of 1849 (*a*) it was provided that all deeds enrolled in the Petty Bag Office or in the Enrolment Office in Chancery (which include conveyances to charitable uses and disentailing assurances) should be endorsed with a certificate of enrolment under the seal of the office, and that such certificate should be sufficient *primâ facie* evidence of the enrolment, and the time thereof. Since the 6th of April, 1880, the Enrolment Department of the Central Office has been the place of enrolment of all deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the Courts whose jurisdiction has been transferred to the High Court of Justice; and certificates appearing to be sealed with a seal of the Central Office

(*q*) *Bryant* v. *Busk,* 4 Russ. 1; see also the authorities cited in note (*n*), p. 137, above. Execution may be presumed after a long lapse of time; *Moulton* v. *Edmonds,* 1 De G., F. & J. 246.

(*r*) *Hart* v. *Hart,* 1 Hare, 1; Taylor, Evidence, § 127, 5th ed.

(*s*) Stat. 27 Hen. VIII. c. 16.

(*t*) Stat. 51 & 52 Vict. c. 42, s. 4, replacing 9 Geo. II. c. 36, and amended by 54 & 55 Vict. c. 73.

(*u*) Stat. 3 & 4 Will. IV. c. 74, s. 41.

(*x*) *Doe* v. *Lloyd,* 1 Man. & Gr. 671, 684-5; Taylor, Evidence, § 1462, 5th ed.

(*y*) Taylor, Evidence, § 1462, 5th ed.

(*z*) *Doe* v. *Lloyd,* ubi sup.

(*a*) Stat. 12 & 13 Vict. c. 109, ss. 12, 18, repealed with extensive savings (see *Sayers* v. *Collyer,* 28 Ch. D. 103, 107; *Re R.*, 1906, 1 Ch. 730) by 56 & 57 Vict. c. 54.

shall be presumed to have issued from the Central Office, and may be received in evidence without further proof of authenticity (*b*).

Exchange or partition, order of, under the Inclosure Act, 1845, and amending Acts (*c*), proved by a copy of the order under the seal of the Commissioners, the Board of Agriculture, the Board of Agriculture and Fisheries or the Ministry of Agriculture and Fisheries, according to the date of the order (*d*). Exchange or partition, order of.

Fine:—proved (1) by the chirograph, that is, the indentures which were made recording the transaction and which it was the duty of the proper officer to deliver to the parties (*e*); (2) by an exemplification; (3) by an examined copy (*f*); (4) as a record under the charge of the Master of the Rolls (*g*). Conveyancers usually received office extracts as evidence (*h*). Fine.

Lease for a year made for giving effect to a release executed before the 15th of May, 1841:—proved, without giving any evidence of loss, by the recital or mention thereof in the release (*i*). Lease for a year.

Pedigree, matters of. The regular conveyancing evidence that a child was born of certain parents is a certificate of baptism (*k*), that is, a certified extract from the parochial register (*l*). But a certificate of birth, which is a certified ex- Pedigree; birth.

(*b*) R. S. C. 1883, Order 61, rr. 7, 9, replacing R. S. C. April, 1880, rr. 45, 46.

(*c*) See stats. 8 & 9 Vict. c. 118, ss. 147, 150; 9 & 10 Vict. c. 70, ss. 9—11; 10 & 11 Vict. c. 111, ss. 4, 6; 11 & 12 Vict. c. 99, ss. 13, 14 (partition); 12 & 13 Vict. c. 83, ss. 7, 11; 15 & 16 Vict. c. 79, ss. 31, 32; 17 & 18 Vict. c. 97, s. 5; 20 & 21 Vict. c. 31, ss. 4—11; 22 & 23 Vict. c. 43, ss. 10, 11; 39 & 40 Vict. c. 56, s. 33.

(*d*) See above, p. 134, nn. (*z*), (*b*).

(*e*) Black. Comm. 296, 351; Taylor, Evidence, § 1384, 5th ed.; *Appleton* v. *Braybrook,* 6 M. & S. 34, 37, 38.

(*f*) Burt. Comp. pl. 487.

(*g*) See below; Taylor, Evidence, §§ 1338, 1377, 5th ed.

(*h*) Burt. Comp. pl. 489; Sug. V. & P. 414; 1 Dart, V. & P. 315, 5th ed.; 356, 6th ed.; 352, 7th ed.

(*i*) Stat. 4 & 5 Vict. c. 21, s. 2. This Act was repealed by stat. 37 & 38 Vict. c. 96, but with such extensive savings that the rule enacted by s. 2 seems to be preserved, see *Sayers* v. *Collyer,* 28 Ch. D. 103, 107; *Re R.,* 1906, 1 Ch. 730; Dart, V. & P. 314, 5th ed.; 356, 6th ed.

(*k*) Coventry, Conveyancers' Evidence, 278; Sug. V. & P. 415; 1 Dart, V. & P. 346, 347, 5th ed.; 392, 6th ed.; 386, 7th ed.

(*l*) See Taylor, Evidence, §§ 1436-8, pp. 1369-71, 5th ed.

tract from the general register of births (*m*), is equally good (*n*).

Age. A certificate of baptism affords no exact evidence of a child's age, beyond that the child was born before the date of the certificate: but the Court, in pedigree cases, may look at the statements contained in such certificates, and weigh them in connection with other evidence (*o*). A certificate of birth, however, is *primâ facie* evidence of the date as stated therein as

Marriage. well as of the fact of birth (*p*). Marriage is regularly proved by a certificate of marriage extracted from the parochial or

Death. general register; and death by a certificate of burial (*q*). And it is doubtful whether a purchaser would be compelled to accept a certificate of death as evidence of that fact, unless good reason were given for not producing a certificate of burial (*r*). Here we may observe that when the facts of birth, marriage or death have to be proved to the Court on such occesions as the payment of money out of Court, the necessary certificates must be accompanied by affidavits as to the identity of the parties named in the certificates (*s*): but it is not the practice to require similar evidence of identity on sales, unless the identity be not apparent on the face of the certificate (*t*). Extracts from non-parochial

(*m*) Established by stat. 6 & 7 Will. IV. c. 86, amended by 7 Will. IV. & 1 Vict. c. 22, and 37 & 38 Vict. c. 88.

(*n*) Above, p. 128, n. (*m*), and n. (*p*), below; 1 Dart, V. & P. 346, 347, 5th ed.; 392, 6th ed.; 386, 7th ed.; *Best* v. *Best*, 1920, P. 75.

(*o*) *Re Turner*, 29 Ch. D. 985, 991-2; Taylor, Evidence, § 1577, 5th ed.

(*p*) *R.* v. *Weaver*, L. R. 2 C. C. R. 85; *Re Goodrich*, 1904, P. 138; *Brierley* v. *Brierley*, 1918, P. 257.

(*q*) Coventry, Conveyancers' Evidence, 278; Sug. V. & P. 415; 1 Dart, V. & P. 346, 347, 5th ed.; 392, 6th ed.; 386, 7th ed.; 1 Davidson, Prec. Conv. 553, 4th ed.

(*r*) 1 Dart, V. & P. 347, 5th ed.; 392, 6th ed.; 386, 7th ed. In proceedings to obtain payment of money out of Court, if it be sought to prove death by a certificate of death and affidavit of identity, the Court will require proof of burial as well; *Riseley* v. *Shephard*, W. N. 1873, p. 150; 21 W. R. 782. There are previous conflicting decisions; *Leach* v. *Leach*, 8 Jur. 211; contra, *Parkinson* v. *Francis*, 15 Sim. 160.

(*s*) Dan. Ch. Pr. 591, n. (*y*), 6th ed.; Seton on Judgments, 153, 7th ed. But at law such certificates may be put in evidence without proof of identity, the question of identity being for the jury; *Hubbard* v. *Lees*, L. R. 1 Ex. 255, 257.

(*t*) Coventry, Conveyancers' Evidence, 278; and see Sug. V. & P. 417. From what is said in 1 Dart, V. & P. 346, 5th ed.; 392, 6th ed.; 386, 7th ed., and 1 Davidson, Prec. Conv. 553, 4th ed., 460, 5th ed., one would gather that evidence of identity was usually required: but it is submitted that on sales the practice is as above stated.

registers of birth, baptism, marriage or death, as those kept in dissenting communities, have long been received by conveyancers as evidence (*u*); and extracts from certain non-parochial registers deposited with the Registrar-General are now available as evidence in litigation (*x*). As we have seen (*y*), in the absence of the regular formal evidence of these facts, recourse is had to other means of proof; preferably, of course, to evidence admissible in litigation, such as the declarations of deceased members of the family (*z*), but in default thereof, to statutory declarations of living members of the family and even of strangers.

Presumption as between vendor and purchaser.

Where no evidence at all can be furnished in some matter of pedigree, recourse may be had to presumption, but the conveyancer must bear in mind that the rules which govern the presumption of marriage, legitimacy or death as between adverse litigants claiming some property by title of inheritance or otherwise, do not strictly apply as between vendor and purchaser (*a*). In litigation of this kind the contest is whether of the two parties can show the better right, and if the plaintiff can show a better title than the defendant (or *vice versâ*), he may be entitled to succeed, notwithstanding that there may be some third party entitled to take in priority to both of them. But the title which a vendor of land is bound to show, at least under an open contract, is a title good against all other persons (*b*). The purchaser is therefore always entitled to proof of all matters of fact, which are part of or affect the title (*c*); and the vendor cannot absolve himself from the obligation of producing such evidence on the plea that, if the parties were engaged in litiga-

(*u*) Sug. V. & P. 418; 1 Dart, V. & P. 346, 347, 5th ed.; 392, 6th ed.; 386, 7th ed.

(*x*) See stat. 3 & 4 Vict. c. 92, amended by 21 & 22 Vict. c. 25; Taylor, Evidence, § 1354, 5th ed. Cf. *Re Woodward*, 1913, 1 Ch. 392.

(*y*) Above, p. 120.

(*z*) As to the evidence admissible in matters of pedigree, see Taylor, Evidence, §§ 571 *sq.*, pp. 569 *sq.*, 5th ed.; Stephen, Evidence, Art. 31; 1 Dart, V. & P. 336—351, 5th ed.; 381—397, 6th ed.; 376—386, 7th ed.

(*a*) See Sug. V. & P. 418, 421, also 404; 1 Dart, V. & P. 336, 338, 340, 343, 5th ed.; 381, 383, 385, 389, 6th ed.; 376, 378, 380, 383, 7th ed.

(*b*) See previous note.

(*c*) 1 Dart, V. & P. 328, 5th ed.; 372, 6th ed.; 368, 7th ed.

tion to obtain possession of the property sold, there would be a presumption dispensing the vendor from proving the point at issue affirmatively. Besides, the rule of equity is that the vendor cannot enforce specific performance of the contract where the title shown is too doubtful in respect of some fact on which its validity depends (*d*). And even by the rule of law, where the title depends on some fact, the fact must be proved with reasonable certainty (*e*). No doubt it is true that in some cases a purchaser is obliged to accept what are called presumptions of fact: but these presumptions are really inferences or conclusions to be drawn from certain evidence produced (*f*), and not such presumptions as absolve one party to an action from giving any proof at all. And it is thought that the only rule which binds a purchaser as to these so-called presumptions of fact is that already stated, namely, that he must presume whatever a judge would at law direct a jury to presume, but cannot be required to presume any matter which the judge would leave to the jury to pronounce on the effect of the evidence (*g*). As regards death especially, where the title to land sold depends upon the fact of a death having occurred, and no evidence of the death can be procured, no legal presumption arises, in favour of the vendor and as against the purchaser, from the fact that the person, whose death is required to be established, has not been heard of for the last seven years or longer by those with whom he would naturally have communicated if alive (*h*).

No presumption of death as between vendor and purchaser.

(*d*) See below, Chap. XIX. § 3.

(*e*) See *Jeakes* v. *White*, 6 Ex. 873; *Simmons* v. *Heseltine*, 5 C. B. N. S. 554, 571; *Clarke* v. *Willott*, L. R. 7 Ex. 313; Sug. V. & P. 400, 405.

(*f*) See note (*h*), at end.

(*g*) Above, p. 122.

Presumption of death in litigation.

(*h*) Coventry, Conveyancers' Evidence, 286; Sug. V. & P. 418; 1 Dart, V. & P. 340, 5th ed.; 385, 6th ed.; 380, 7th ed. As between adverse litigants for the possession of property or in respect of other matters, there is a presumption of law that a person is dead when he has not been heard of for seven years by those with whom he would naturally have communicated, if alive, unless the circumstances be such as to account for the absence of communication without presuming death: but no presumption of law arises with respect to the time of such death (*i.e.*, that he died at any particular moment of time during those years); and where a person has disappeared and has not been heard of for *less* than seven years, no presumption of law arises that he has since continued to live: *Nepean* v. *Doe*, 2 M. & W. 894; *R.* v. *Lumley*, L. R. 1 C. C. R. 196; *Re Phené's Trust*, L. R. 5 Ch. 138; *Re Lewes' Trusts*, L. R. 6 Ch. 356; *Re Rhodes*, 36 Ch. D. 586; *Re Benjamin*, 1902, 1 Ch. 723; *Re Aldersey*, 1905,

As between adverse litigants, the presumptions as to marriage and legitimacy are these:—When a man and a woman have lived together as and with the reputation of being man and wife, it is presumed (unless the contrary be shown) that they were lawfully married and not living in a state of concubinage (*i*). And where it is established that a marriage ceremony took place, the like presumption arises in favour of the existence of every circumstance necessary to its validity (*k*). There is also a presumption that every child born in wedlock—that is, at any time during the continuance of the marriage between its parents, no matter how soon after the marriage ceremony (*l*)—is the child of the husband; but this presumption may be rebutted by evidence that the husband and wife have not had sexual intercourse within such period previous to the child's birth as would be necessary to produce the gestation in question (*m*). This presumption arises, although the husband and

Presumption of marriage.

Presumption of legitimacy or paternity.

2 Ch. 181; Stephen, Evidence, Art. 99; see also *Prudential Assurance Co.* v. *Edmonds*, 2 App. Cas. 487. Also, when two or more persons meet their death in some common calamity (such as a shipwreck or a massacre), there is no presumption of law arising from age or sex that any one of them survived the other or others, neither is there any presumption of law that they died at the same time: *Underwood* v. *Wing*, 4 De G., M. & G. 633; *Wing* v. *Angrave*, 8 H. L. C. 183; *Re Alston*, 1892, P. 142; *Re Beynon*, 1901, P. 141. And there is no presumption of law that a person, who is dead, left no issue: *Re Jackson*, 1907, 2 Ch. 354. All the above-mentioned matters, as to which no presumption of law arises, must be proved positively: but the jury, or other proper tribunal to determine questions of fact, may draw an inference (often styled a presumption) *of fact* in respect thereof, if evidence sufficient to warrant such inference be submitted; see the cases above cited. So also where a man has disappeared in circumstances which make it likely that he has met his death, an inference *of fact* may be drawn that he is dead, notwithstanding that a far shorter space of time than seven years has elapsed since his disappearance: *Sillick* v. *Booth*, 1 Y. & C. C. C. 117; *Re Beasney's Trusts*, L. R. 7 Eq. 498; *Hickman* v. *Upsall*, L. R. 20 Eq. 136; *Re Alston*, ubi sup.; *Re Matthews*, 1898, P. 17; cf. *Ommaney* v. *Stilwell*, 23 Beav. 328. As to the difference between presumptions of law and of fact, see Taylor, Evidence, §§ 61, 62, 94-97, 169-171, 5th ed.; Stephen, Evidence, Art. 1 and note 1.

Death in common calamity.

(*i*) *Piers* v. *Piers*, 2 H. L. C. 331, 362-364, 370, 371, 379, 380; *Breadalbane Case*, L. R. 1 Sc. App. 182, 199, 200; *Lyle* v. *Ellwood*, L. R 19 Eq. 98, 107; *Re Shephard*, 1904, 1 Ch. 456.

(*k*) See cases cited in previous note; *Harrison* v. *Southampton Corpn.*, 4 De G., M. & G. 137; *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*, 6 App. Cas. 364.

(*l*) Co. Litt. 244 a; *Poulett Peerage*, 1903, A. C. 395, 398.

(*m*) *Morris* v. *Davies*, 5 Cl. & Fin. 163, 215, 229, n., 251, 252, 260, 262, 265; *R.* v. *Mansfield*, 1 Q. B. 444; *Saye & Sele Barony*, 1 H. L. C. 507, 511, 512; *Hawes* v. *Draeger*, 23 Ch. D. 173, 178; *Aylesford*

wife be separated by mutual consent, and even when the wife is living in adultery with another man (*n*); and it extends to all

Evidence in questions of non-intercourse between husband and wife.

Peerage, 11 App. Cas. 3, 17; *Bosvile* v. *A.-G.,* 12 P. D. 177 (appeal abandoned, 1887, W. N. 181); *Burnaby* v. *Baillie,* 42 Ch. D. 282, 297, 298. The question, whether such intercourse did take place, is one of fact to be proved in the ordinary way and to be decided by the jury or other proper tribunal for pronouncing on questions of fact: but clear evidence is required to rebut the presumption of legitimacy; the matter is not to be decided on a mere balance of probabilities. And after evidence tending to establish such intercourse (as that the husband and wife occupied the same bedroom) has been given, then no other evidence is admissible than such as tends to disprove the inference of the intercourse having taken place; see the cases above cited. The fact of non-intercourse may be inferred from the conduct of the husband or wife, and their statements made at the time or afterwards are admissible in evidence as part of the *res gestæ* and in proof of their conduct; *Aylesford Peerage,* 11 App. Cas. 3; *Burnaby* v. *Baillie,* 42 Ch. D. 282, 291. But neither of them is admissible as a witness, at the trial of the issue of the legitimacy of the child, to state whether the required intercourse took place or not; nor is any statement or declaration of either of them with regard to this matter admissible as direct evidence thereof; *R.* v. *Sourton,* 5 A. & E. 180; *Nottingham Guardians* v. *Tomkinson,* 4 C. P. D. 343; *Hawes* v. *Draeger,* 23 Ch. D. 173, 178; *Burnaby* v. *Baillie,* 42 Ch. D. 282, 293. In the second and fourth of these cases the Court declined to follow a contrary decision in *Re Yearwood's Trusts,* 5 Ch. D. 545. This rule however relates only to the proof or disproof of sexual intercourse between husband and wife during their marriage; it does not prevent either of them, on the trial of the legitimacy of a child born so soon after marriage that it must necessarily have been begotten before the marriage, from being admitted to give evidence whether such intercourse took place between them before their marriage; *Poulett Peerage,* 1903, A. C. 395, overruling *Anon.* v. *Anon.,* 22 Beav. 481, 23 Beav. 273. Evidence of the husband or wife is also admissible in any proceeding instituted in consequence of adultery with regard to the issue, whether adultery has taken place or not; but not, it appears, on the issue of the legitimacy of any child of the wife's; stat. 32 & 33 Vict. c. 68, s. 3; *Hetherington* v. *Hetherington,* 12 P. D. 112, 114; *Evans* v. *Evans,* 1904, P. 378. Questions of the legitimacy of any natural-born British subject domiciled in England or Ireland, or claiming any real or personal estate situate in England, or of the validity of his marriage or that of his parents or grandparents, may be determined in proceedings instituted in the Probate Division under the Legitimacy Declaration Act, 1858 (stat. 21 & 22 Vict. c. 93): but any decree so obtained does not prejudice any person unless he has been cited or made a party to the proceedings, or is the heir-at-law or next of kin, or other real or personal representative of or derives title under or through a person so cited or made a party, and such decree will not prejudice any person if subsequently proved to have been obtained by fraud or collusion: s. 8. The Court has no jurisdiction to determine in such proceedings any question of the heirship of real estate; *Mansel* v. *A.-G.,* 2 P. D. 265. It may be noted here that no child born out of wedlock can in any circumstances inherit any real estate in England

Proceedings under the Legitimacy Declaration Act, 1858.

Bastards.

(*n*) See cases cited in previous note and in n. (*r*), p. 145, below; *Hargrave* v. *Hargrave,* 9 Beav. 552.

children born within due time after the husband's death (*o*) or the dissolution of the marriage (*p*). But when the husband and wife have been separated by a decree of divorce *a mensâ et thoro*, a sentence of judicial separation or a separation order (*q*), the presumption ceases with respect to children born after the expiration of such time subsequent to the decree, sentence or order as is equal to the usual period of gestation (*r*).

Record in Record Office.

Record under the charge and superintendence of the Master of the Rolls for the time being (*s*). Proved by a copy certified as true and authentic by the deputy keeper of the records, or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the Record Office (*t*).

Recovery.

Recovery, common:—proved by an exemplification or an examined copy (*u*) or as a record under the charge of the Master of the Rolls (*x*). Conveyancers accepted office extracts (*y*).

as heir to and upon the death and intestacy of any person; *Doe* d. *Birtwhistle* v. *Vardill*, 5 B. & C. 438; 2 Cl. & Fin. 571; *Birtwhistle* v. *Vardill*, 7 Cl. & Fin. 895; *Escallier* v. *Escallier*, 10 App. Cas. 312, 317. But where a gift is made by will, or (as it seems) by an instrument operating *inter vivos*, of any real or personal estate situate in England to the child or children of any person domiciled in some country where the law admits of legitimation *per subsequens matrimonium*, a child so legitimated may take thereunder as a lawful child of such person; *Skottowe* v. *Young*, L. R. 11 Eq. 474; *Re Andros*, 24 Ch. D. 637; *Re Grey's Trusts*, 1892, 3 Ch. 88. It has also been held that children so legitimated may as children or next of kin succeed on intestacy to personal chattels under the Statute of Distributions (stat. 22 & 23 Car. II. c. 10); *Re Goodman's Trusts*, 17 Ch. D. 266, James & Cotton, L. JJ., *diss.* Lush, L. J., reversing Jessel, M. R., 14 Ch. D. 619. *Quære*, whether this decision applies in the case of chattels real situate in England; see *Duncan* v. *Lawson*, 41 Ch. D. 394; *Pepin* v. *Bruyère*, 1902, 1 Ch. 24; *Re Hoyles*, 1910, 2 Ch. 333, 341, affirmed, 1911, 1 Ch. 179.

Bastards legitimized *per subsequens matrimonium*.

(*o*) See Co. Litt. 123 b and n. (1, 2); Bac. Abr. Bastardy (A); 1 Black. Comm. 456, 457.

(*p*) See cases cited in note (*r*), below; Bac. Abr. Bastardy (A), ed. 1832; *Evans* v. *Evans*, 1904, P. 274, 378, 381; Stephen, Evidence, Art. 98.

(*q*) Under stat. 58 & 59 Vict. c. 39, s. 5, replacing 41 & 42 Vict. c. 19, s. 4.

(*r*) *St. George's Parish* v. *St. Margaret's*, 1 Salk. 123; *Hetherington* v. *Hetherington*, 12 P. D. 112, 114.

(*s*) See Taylor, Evidence, §§ 1337, 1338, 5th ed.

(*t*) Stat. 1 & 2 Vict. c. 94, ss. 1, 12, 13.

(*u*) Coventry, Conveyancers' Evidence, 77; Burt. Comp. pl. 490; 1 Dart, V. & P. 315, 5th ed.; 356, 6th ed.; 352, 7th ed.

(*x*) See above.

(*y*) Sug. V. & P. 414. By stat. 14 Geo. II. c. 20, ss. 4, 5, repealed

Registration. *Registration* of assurances in Middlesex or Yorkshire:—proved by the certificate of registration which it is the registrar's duty to indorse and sign on the registered assurance (*z*). Under the Yorkshire Registries Act, 1884, the registrar is also required to seal the certificate with the seal of the registry (*a*).

Seisin. *Seisin*:—provable on sales by extracts from the land tax or poor rate assessments showing who were the landlords and tenants of the property assessed, or by evidence of acts of ownership, as the grant of a lease under which possession was had, or any letting followed by payment of rent and *à fortiori* a sale or mortgage (*b*). Declarations of deceased occupiers that they held as tenants of another, being against their proprietary interest (*c*), are admissible as evidence of that other's seisin (*d*); and on this ground receipts for rent paid by a deceased person as tenant are evidence of the landlord's seisin, when produced from the proper custody (*e*). Proof of personal occupation only, though *primâ facie* evidence in ejectment of a seisin in fee, is not acceptable as sufficient evidence of seisin on a sale (*f*).

with extensive savings (see 28 Ch. D. 107) by 30 & 31 Vict. c. 59, where an estate had been purchased and held for twenty years under a title which a recovery was necessary to complete, the purchaser and all claiming under him might prove a recovery, of which no record could be found or which appeared not to be regularly entered on record, by production of a deed making a tenant to the præcipe and declaring the uses of the recovery and executed by a person having a sufficient estate for the purpose; and every recovery twenty years old, to which the persons having power to bar the entail were parties, was made valid, if it appeared on the face thereof that there was a tenant to the writ, notwithstanding that the deed for making such tenant were lost or did not appear; see Burt. Comp. pl. 682-694.

(*z*) Stats. 7 Anne, c. 20, s. 6, as to Middlesex; 47 & 48 Vict. c. 54, s. 9, as to Yorkshire, replacing 2 & 3 Anne, c. 4, s. 8; 6 Anne, c. 62 (c. 35, s. 11, in Ruffhead); 8 Geo. II. c. 6, s. 12; Taylor, Evidence, § 1464, 5th ed.

(*a*) Stat. 47 & 48 Vict. c. 54, s. 9.

(*b*) Burt. Comp. pl. 418-436; Coventry, Conveyancers' Evidence, 275, 276; *Welcome* v. *Upton*, 6 M. & W. 536, 540, 542; *Moulton* v. *Edmonds*, 1 De G., F. & J. 246, 248; *Bristow* v. *Cormican*, 3 App. Cas. 641, 653, 668—670; *Van Dieman's Land Co.* v. *Table Cape Marine Board*, 1906, A. C. 92, 99; and see *Johnston* v. *O'Neill*, 1911, A. C. 552. The production from the proper custody, that is, the landlord's, of a lease expired at a time beyond living memory is sufficient evidence of seisin, without proof of enjoyment thereunder; *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.

(*c*) Above, p. 128.

(*d*) *Doe* d. *Daniel* v. *Coulthred*, 7 A. & E. 235, 239; *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497, 514; Taylor, Evidence, § 618, 5th ed.

(*e*) Burt. Comp. pl. 429.

(*f*) Hubback, Evidence, 131; 1 Dart, V. & P. 334, 5th ed.; 379, 6th ed.; 383, 7th ed.; above, p. 98.

Will:—proved on a sale by production of the probate or an office copy, whether the will relate to personal estate only or to real and personal estate, or, where the testator died on or after the 1st of January, 1898, to real estate only (*g*). If the will should not have been proved—and a will of real estate, as such, does not require to be proved (*h*)—the original must of course be produced (*i*). As in the case of deeds (*k*), it was not the practice on sales to require proof of the due signature and attestation of any will of real estate forming part of the title; but wills purporting to have been signed and attested as required by law (*l*) were presumed to have been made with the proper formalities (*m*). Since the Wills Act required all wills, whether of real or personal estate, to be executed, as a rule, in the same manner (*n*), the fact that a will has been proved

Will.

(*g*) Coventry, Conveyancers' Evidence, 91, 93; Sug. V. & P. 414; 1 Dart, V. & P. 319, 5th ed.; 362, 6th ed.; 358, 7th ed. At common law, the probate copy of a will of personalty was conclusive evidence of the contents of the will; *Allen* v. *Dundas,* 3 T. R. 125; but to prove a devise of real estate, production of the original will (whether proved or not) was required. The probate of a will is now admissible as evidence of a devise of real estate under the conditions specified in stat. 20 & 21 Vict. c. 77, ss. 62, 64, 65; Taylor, Evidence, §§ 1565A, B, and C, 5th ed.; *Barraclough* v. *Greenhough,* L. R. 2 Q. B. 612.

(*h*) Originally there was no jurisdiction to grant probate of a will dealing only with real estate; 1 Wms. Exors. pt. i. bk. iv. ch. ii. § 9, p. 389, 7th ed.; *In the Goods of Tomlinson,* 6 P. D. 209; *In the Goods of Hornbuckle,* 15 P. D. 149. But by the Land Transfer Act, 1897, stat. 60 & 61 Vict. c. 65, s. 1 (3), probate may be granted in respect of real estate only where the testator has died on or after the 1st January, 1898. It does not appear that this enactment *requires* a will only disposing of real estate to be proved. But the law requires a will appointing an executor to be proved; and before the Land Transfer Act, 1897, took effect, a will of real estate, which also appointed an executor *in whom the testator's personalty would vest,* would be admitted to probate; see *O'Dwyer* v. *Geare,* 1 Sw. & Tr. 465; *Re Jordan,* L. R. 1 P. & D. 555; *Re Cubbon,* 11 P. D. 169; and cases cited above. It is clear that the appointment of the personal representatives, in whom under the above Act a deceased person's real estate now vests, must be evidenced, in the case of executors, by a will duly proved, or in the case of an administrator, by letters of administration granted by the Court. But if a testator make one will of his personalty, appointing executors, and another will containing nothing but a devise of his real estate, it does not appear that the law requires the will of realty to be proved.

Law as to probate of wills of realty.

(*i*) Sug. V. & P. 414.

(*k*) Above, pp. 107-110.

(*l*) See Wms. Real Prop. 258, 23rd ed.

(*m*) Coventry, Conveyancers' Evidence, 91, 93-95.

(*n*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9; see Wms. Pers. Prop. 478-481, 17th ed.

strengthens the presumption that it was duly signed and attested (*o*).

(*o*) As to the evidence required on probate, see 1 Wms. Exors. pt. i. bk. iv. ch. ii. § 3; Wms. Pers. Prop. 490, 491, 17th ed. It must, however, be borne in mind that a will of personalty (other than leaseholds) made by an alien, and a will of personalty (including leaseholds) made out of the United Kingdom by a British subject, may be admitted to probate in England, if executed as required by law in the case of such wills, although not executed and attested by two witnesses as required by the Wills Act, 1837, for wills generally; see Wms. Pers. Prop. 478-481, 17th ed. And under stat. 7 & 8 Geo. V. c. 58, s. 3 (passed 6th February, 1918), informal wills of real estate in England or Ireland made by soldiers in actual military service or mariners or seamen at sea, or members of His Majesty's naval or marine forces either at sea or so circumstanced that if soldiers they would be on actual military service, who die after the passing of the Act, are valid if made in accordance with the law governing wills of personal estate made by such persons, and notwithstanding that the testator was an infant when the will was made; see Wms. Real Prop. 261-263, 23rd ed.; *Re Wardrop*, 1917, P. 54; *Re Stable*, 1919, P. 7.

CHAPTER V.

OF ADVISING ON TITLE GENERALLY.

In the preceding chapter we endeavoured to give a general view of the vendor's obligation to show a good title and its discharge. We will now consider the same subject from the point of view of a conveyancer instructed to advise the purchaser whether the title shown by the vendor can be accepted.

Duty of conveyancer advising the purchaser on title.

The first duty of a conveyancer so instructed is of course to read the contract for sale, and then to peruse the abstract of title with reference to the contract. And his task is to ascertain whether the vendor has shown a good title according to the contract, that is, such a title as the contract binds the purchaser to accept, taking into account in the case of a contract other than an open contract the limitations or restrictions thereby imposed on the purchaser's rights as defined by law. He has to satisfy himself that on all points, save those on which the right to call for proof is precluded by the contract, the vendor has shown that he has the right to convey what he contracted to sell (*a*). If a freehold in fee were sold, the conveyancer must see that the purchaser will get both the legal and equitable estate in fee simple, free from all incumbrances, save those, if any, subject to which he contracted to take the land. If copyholds were bought, the purchaser's adviser must ascertain that his client will be duly admitted tenant on the rolls of such an estate as was sold. If the land sold were leasehold, the conveyancer must take care that the lease or term offered by the abstract corresponds at all points with that promised by the contract; the purchaser, as we have seen (*b*), being entitled to require a lease from the freeholder unless the contract distinctly specified an underlease as the subject of the sale, and not being obliged to accept a lease at covenants more stringent than those usually

(*a*) Above, p. 88.
(*b*) Above, p. 93, n. (*i*).

inserted in the kind of lease purchased, unless the existence of such covenants were brought to his notice by the contract (*c*).

What should be the general scope and result of the abstract.

Before discussing any of the details of an abstract examined on behalf of a purchaser, let us consider what should be its general scope and result. It should show title for the time prescribed by law or settled by special stipulation as sufficient to prove a good title, according to the nature of the property sold (*d*); it should commence with a good root of title and continue to deal with the whole legal and equitable estate in the land purchased (*e*); and it should end in showing that the vendor can convey or cause to be conveyed to the purchaser the whole estate contracted for in the land sold. But it is important to observe that it is not necessary for the vendor to show upon the abstract that the whole estate sold is vested in himself. It is sufficient if it appear that he has, or may obtain by acts of which the performance rests with himself alone (*f*), the right to convey or cause others to convey to the purchaser the estate sold; and if such a right be established, the abstract is complete, and it is considered a matter to be dealt with on the preparation of the conveyance rather than on the investigation of title for the vendor to obtain the concurrence of all other persons necessary to vest in the purchaser the whole legal and equitable estate which he contracted to buy (*g*). Thus it is of course sufficient if the abstract show that the vendor has a power of appointment or other power which will enable him to convey the estate sold. So if the land sold be vested in trustees holding on trust for the vendor absolutely, a good title is shown on the abstract; for the vendor is entitled in equity to direct them to convey as he will (*h*). Or if the abstract show that the vendor is entitled under an uncompleted contract of purchase, that is *ab initio* an unobjectionable title; but the purchaser will have a right to object to the title if the vendor's contract be not completed, so

Vendor need not show the whole estate to be vested in himself, if he have the right to procure its conveyance.

Vendor having power to convey—

or entitled in equity—

or under an uncompleted contract of purchase—

(*c*) *Reeve* v. *Berridge*, 20 Q. B. D. 523; *Re White and Smith's Contract*, 1896, 1 Ch. 637.

(*d*) Above, pp. 93 *sq.*

(*e*) Above, pp. 98 *sq.*

(*f*) *Esdaile* v. *Stephenson*, 6 Madd. 366; *Brewer* v. *Broadwood*, 22 Ch. D. 105, 109.

(*g*) See 8 Ves. 436; *Townsend* v. *Champernown*, 1 Y. & J. 449; Sug. V. & P. 217, 218, 349, 423-425; Dart, V. & P. 281-286, 5th ed.; 321-326, 1177 *sq.*, 6th ed.; 317-322, 7th ed.

(*h*) Wms. Real Prop. 191, 23rd ed.; *Kitchen* v. *Palmer*, 46 L. J. Ch. 611.

as to enable him to convey the legal estate to the purchaser, at the proper time for completion of the re-sale (*i*). And if the land sold be subject to mortgages, the vendor has none the less shown a good title on the abstract, provided that the mortgages be immediately redeemable by him. And this is the case even though the amount secured by the mortgages exceed that of the purchase money, or the mortgages affect other lands than those purchased; as it appears to be considered that, so long as the vendor has the right of redemption, it merely rests with him to exercise it, the mortgagees being bound to take the money secured, if all that is due be tendered, and to re-convey on such payment (*k*). Here we may notice that the general rule of equity, that a mortgagor must give six months' notice of his intention to pay off the mortgage (*l*), is no bar to the immediate exercise of the right of redemption; for the mortgagor is entitled to pay to the mortgagee six months' interest in advance in lieu of such notice (*m*). Any mortgage redeemable in accordance with this general rule may therefore be considered as immediately redeemable for the purposes of a sale of the mortgaged land. But it is of course quite a different thing if the land sold be subject to a mortgage, which is not to be called in or paid off during a certain term. In such case the discharge of the incumbrance is not a matter resting with the mortgagor alone; as the mortgagee cannot be obliged to receive back his money during the term (*n*).

or subject to mortgages.

The reader must bear in mind the distinction between showing a good title on the abstract and showing a good title in the sense of completely discharging the vendor's obligation to show

Distinction between showing a good title on the abstract and proving it.

(*i*) *Re Hucklesby and Atkinson's Contract,* 102 L. T. 214, 217; *Stickney* v. *Keeble,* 1915, A. C. 386 (see the author's comments on this case in 66 Sol. J. 136—138).

(*k*) *Esdaile* v. *Stephenson,* 6 Madd. 366; *Townsend* v. *Champernown,* 1 Y. & J. 449; *Savory* v. *Underwood,* 23 L. T. O. S. 141; Sug. V. & P. 425; 1 Dart, V. & P. 283, 284, 5th ed.; 323, 324, 6th ed.; 319, 320, 7th ed.; and see *Re Daniel,* 1917, 2 Ch. 405, where the title was properly accepted, but the vendor was afterwards held liable to pay substantial damages for failing to procure the mortgagee to concur in the conveyance.

(*l*) Wms. Real Prop. 619, 23rd ed.

(*m*) *Johnson* v. *Evans,* W. N. 1889, p. 95.

(*n*) See *Esdaile* v. *Stephenson,* 6 Madd. 366; *Lewin* v. *Guest,* 1 Russ. 325; Sug. V. & P. 425; 1 Dart, V. & P. 284, 5th ed.; 324, 6th ed.; 320, 7th ed.; *Brickles* v. *Snell,* 1916, 2 A. C. 599, 606, where however the mortgagee was willing to accept immediate payment, and the purchaser seems to have waived the objection.

or make a good title. That is a matter depending on proof, not mere statement of title, and is not accomplished until an abstract showing a good title has been duly verified by production of the proper evidence (*o*). Thus, although a good title is shown on the abstract, notwithstanding the existence of mortgages exceeding the amount of the purchase-money, the vendor cannot of course make a good title if he be unable to pay off such mortgages or procure the mortgagees to release their charges (*p*).

A good title then is shown on the abstract, if it appear that the vendor has an equitable right in the land sold, by virtue of which he is, or may by doing acts which are independent of others' consent immediately become, entitled to direct the conveyance to the purchaser of all the estate sold (*q*). And where a future day is fixed for completion of the contract, a good title is sufficiently shown on the abstract if it appear that the vendor will certainly have such an equitable right as above mentioned before the time fixed for completion, although he have not and cannot immediately procure such right (*r*). But it is otherwise if any part of the estate contracted for be outstanding in some person, whom the vendor has no right to direct to convey, and the vendor cannot procure such right without the other's consent. In such case a good title in the vendor is not shown. This may be illustrated, not only by the example already given of land subject to a mortgage not to be paid off during a certain term, but also by the instances of lands subject to dower, or a jointure rent-charge (*s*), or a lease for lives (*t*),

Good title not shown if any estate outstanding in one, whom the vendor has no right to direct to convey.

(*o*) See *Southby* v. *Hutt*, 1 My. & Cr. 207, 212, 213; above, pp. 106 *sq.* In actions for specific performance of contracts for sale of land the usual inquiry directed as to title is whether a good title can be made to the property sold, and if so, when it was first shown that such good title could be made; Seton on Judgments, 2158, 7th ed. The inquiry when a good title was first shown relates to the time when it was first shown upon the face of the abstract; but the inquiry, whether a good title can be made, means whether the vendor can prove a good title by the usual evidence; *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. N. S. 600; Sug. V. & P. 424, 425; see however *Halkett* v. *Dudley*, 1907, 1 Ch. 590, 606, where *Parr* v. *Lovegrove* was not cited, and Parker, J., appears to have overlooked this distinction.

(*p*) See *Re Daniel*, 1917, 2 Ch. 405; above, note (*k*), p. 151.

(*q*) See note (*g*) to p. 150, above.

(*r*) Dart, V. & P. 284, 5th ed.; 324, 6th ed.; 320, 7th ed.; see *Noble* v. *Edwardes*, 5 Ch. D. 378; *Bellamy* v. *Debenham*, 1891, 1 Ch. 412.

(*s*) *Esdaile* v. *Stephenson*, 6 Madd. 366.

(*t*) *Hughes* v. *Jones*, 3 De G., F. & J. 307.

or restrictive covenants (*u*), or of lands, under which the mines and minerals are not the vendor's (*v*), or of land sold as held for a term of a certain number of years, which is in fact determinable earlier at the lessor's option (*x*). So also, where land is expressly or impliedly sold with vacant possession, a good title is not shown if it be subject to any tenancy for years or less, which will not expire before the day fixed or the proper time for completion (*y*). And where leaseholds are sold, which are not assignable without the lessor's licence, a good title is not shown unless the vendor procure the licence; although, by a departure from the general principle above stated, the procurement of the licence is treated as a matter of conveyance rather than of title, and the vendor is allowed until the day fixed for completion to obtain it (*z*). *A fortiori*, the purchaser can object to the title, where it appears that the whole title is in some third person whose conveyance the vendor has no *right*, legal or equitable, to direct. Nor is the case altered by the fact that

Sale of land with vacant possession.

(*u*) *Flight* v. *Booth*, 1 Bing. N. C. 370; *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *Rudd* v. *Lascelles*, 1900, 1 Ch. 815, 821; *Pemsel* v. *Tucker*, 1907, 2 Ch. 191, where the property sold was subject to a restrictive stipulation as to light, and a drain, which was a sewer vested in the local authority, ran under the land. It is respectfully submitted that these cases, which were not cited in *Procter* v. *Pugh*, 1921, 2 Ch. 256, 257, show that the ruling of Sargant, J., in that case, as to the nature of the objection to title caused by the existence of restrictive covenants, was erroneous; see the author's criticism of the decision and judgment in that case in 66 Sol. J. 119, 120, 135.

(*v*) *Bellamy* v. *Debenham*, 1891, 1 Ch. 412; *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412, 424, 425; *McGrory* v. *Alderdale Estate Co.*, 1918, A. C. 503, 507, 510, 512.

(*x*) *Weston* v. *Savage*, 10 Ch. D. 736.

(*y*) See above, pp. 32, 33, and n. (*m*), 39, and n. (*r*). It is apprehended that, where land is sold under a contract expressly or impliedly promising to convey the fee simple, free from incumbrances, it is *primâ facie* a term of the contract that the purchaser shall on completion be put into actual (and not constructive) possession of the property; *Hughes* v. *Jones*, 3 De G., F. & J. 307, 314. But in *Lake* v. *Dean*, 28 Beav. 607, on a sale of land "*as the same is now in the occupation of L. P.*" and the fee simple thereof, free from all incumbrances except quit rents, with a stipulation that the purchaser should have possession on the day fixed for completion, it was considered by Romilly, M. R., that the purchaser had in fact bought subject to L. P.'s occupation and the terms thereof, and it was held that he was not entitled to demand vacant possession on completion, but must accept possession of the freehold subject to such occupation. A purchaser buying land by private contract and desiring to obtain actual possession on completion should expressly stipulate for *vacant* possession, especially if the land is described as being in the occupation of a tenant; see Sug. V. & P. 8; *North* v. *Loomes*, 1919, 1 Ch. 378, 380, 382.

Lake v. *Dean*.

(*z*) *Day* v. *Singleton*, 1899, 2 Ch. 320, 327; see below, Chap. X. § 2.

the vendor offers to procure the concurrence of such third person, and the latter is willing to give it; so long as the latter is under no obligation enforceable in a court of justice to convey according to the vendor's direction (*a*). On this point the case of *Re Bryant and Barningham's Contract* (*b*) is very instructive. Two persons sold land as trustees for sale. It appeared from the abstract that the trust for sale did not arise until after the death of a tenant for life, who was still living; but the vendors, on this objection being pointed out, offered to procure a conveyance from the tenant for life under the Settled Land Acts. This the purchaser declined; and the vendors endeavouring to oblige him to take this title in a vendor and purchaser summons, it was held that he was justified in his objection thereto. The court pointed out that the vendors themselves could make no title, having no immediate right to convey, and that the proposed conveyance could only be effectually secured by a new contract made with the tenant for life; an arrangement, into which the vendors had no right to require the purchaser to enter.

Re Bryant and Barningham's Contract.

It appears however that if the purchaser propose to object to the title shown on the ground that the whole or some part of the estate contracted for in the land sold is outstanding in some person, whom the vendor has no right to direct to convey, he must insist on such objection at once, and must immediately and definitely repudiate the contract (*c*). The purchaser is entitled, in such circumstances, to repudiate the contract at once, and need not wait till the day fixed for completion (*d*). If he

Purchaser must at once repudiate the contract if he wish to insist on the objection.

(*a*) *Lewin* v. *Guest,* 1 Russ. 325; *Forrer* v. *Nash,* 35 Beav. 167, 171; *Brewer* v. *Broadwood,* 22 Ch. D. 105; *Lee* v. *Soames,* 36 W. R. 884; cf. *Re Baker and Selmon's Contract,* 1907, 1 Ch. 238, where a trustee sold as the authorised agent of the beneficiaries.

(*b*) 44 Ch. D. 218; see also *Re Head's Trustees and Macdonald,* 45 Ch. D. 310.

(*c*) *Halkett* v. *Dudley,* 1907, 1 Ch. 590, 597; *Re Hailes and Hutchinson's Contract,* 1920, 1 Ch. 233.

(*d*) *Hoggart* v. *Scott,* 1 Russ. & My. 293, 295; *Forrer* v. *Nash,* 35 Beav. 167, 171; and the five cases next cited. It has been expressly decided in Courts of first instance and recognised in the Court of Appeal that this right is one which the purchaser enjoys *at common law;* see *Weston* v. *Savage,* 10 Ch. D. 736, which was an action by a purchaser as plaintiff to enforce actively his right of rescission and to recover his deposit, and was expressly decided from a common law point of view (see 10 Ch. D. 741); *Brewer* v. *Broadwood,* 22 Ch. D. 105, 109, where the purchaser's right of rescission was allowed as a good defence to the vendor's action for damages for breach of the contract, and it was laid down that the purchaser's right of immediate repudiation is not confined to cases where the time fixed for completion is of the essence of the contract; *Lee* v. *Soames,* 36 W. R. 884, where

Purchaser's right to repudiate is given by the common law.

require the vendor to remove the objection by obtaining the concurrence of the other person or persons entitled, or if he

the purchaser sought, as plaintiff, to enforce his right to rescind and recover his deposit and expenses; *Re Bryant and Barningham's Contract*, C.A., 44 Ch. D. 218; *Re Head's Trustees and Macdonald*, C.A., 45 Ch. D. 310, in both of which cases the purchaser repudiated the contract before the day fixed for completion, and the Court ordered the repayment of the deposit with interest and the purchaser's expenses of investigating the title. It is respectfully submitted that the theory put forward by the late Lord Parker, then Parker, J., in *Halkett* v. *Dudley*, 1907, 1 Ch. 590, 596 (in which none of the above cases was cited), is erroneous. The learned judge there maintained that the purchaser's right to repudiate the contract *at once* upon the vendor's failure to show a good title, without waiting for the day fixed for completion, is merely an equitable right affecting the equitable remedy by way of specific performance and is solely attributable to the doctrine of want of mutuality. If that were so, the purchaser so repudiating the contract could not obtain the rescission of the contract or the recovery of the deposit or his expenses of investigating the title; see *Re Scott and Alvarez's Contract*, 1895, 2 Ch. 603; and the purchaser could not plead his right so to rescind the contract as a defence to the vendor's action for damages for breach of the contract; for the doctrine of want of mutuality has no place in English law, except as a defence to an action for specific performance; see below, Chap. XIX. § 3. Besides, to take active proceedings as plaintiff in such a case, a purchaser must have a *legal* right of rescission, though the proceedings in which he can so assert this right owe their origin to the Court of Chancery's concurrent equitable jurisdiction; see below, Chap. XIX. § 1. Parker, J., also said (1907, 1 Ch. 596) that he did not see why, in principle, a vendor, who has sold land, which does not belong to him, but to which he acquires a title before the day fixed for completion, should not be able to recover damages from the purchaser then refusing to complete, and he seemed to think that the common law right of rescission could only arise on failure to show a good title by that day. But it is respectfully submitted that the learned judge altogether failed to appreciate the true nature of the vendor's obligation to show a good title. We have seen that in the same case he overlooked the difference between *showing* title upon the face of the abstract delivered and *proving* title by production of the proper evidence; above, p. 152, n. (*o*). Both of these obligations ought properly to be performed by the vendor well before the day fixed for completion; as it is not until the title is proved that the purchaser can safely accept it, and before such acceptance he cannot safely prepare the draft conveyance; see below, Chap. XII. § 1; XIX. § 2. At common law too time was of the essence of the contract in all respects; so that it cannot be correct that at law the vendor performs the contract, though he shows no title on delivery of the abstract, if he can get it in just before the day fixed for completion. On the contrary, at common law the vendor was bound to have shown and verified a good title and to be ready to convey on that day; above, pp. 52, 53. It is submitted that the authorities above cited prove that the vendor's failure to show a good title on the face of his own abstract at the time of its delivery is at law such a breach of contract as discharges the purchaser from the duty of performing his part of the agreement for sale; see Lord Atkinson's judgment in *Stickney* v. *Keeble*, 1915, A. C. 386, 403, and note that in that case the objection to the title was such as is considered to be a matter of conveyance and did not need to be removed until the time for completion; see above, p. 153; below, p. 170. And the distinction between things which are matter of title and those

Criticism of Lord Parker's theory in *Halkett* v. *Dudley*.

entertain (except without prejudice to his right to repudiate the contract) (*e*) any proposal made by the vendor so to remove

Proper time for showing title.

which are matter of conveyance, points to the conclusion that the proper time for showing title generally is on the delivery of the abstract. Lord Parker's theory was adopted, without any critical examination of it, by Sargant, J., in *Procter* v. *Pugh*, 1921, 2 Ch. 256 (where also none of the above cases was cited): but it is respectfully submitted that this was an error of judgment; see the author's criticism of the decision and judgment in that case in 66 Sol. J. 119, 135, where the subject of this note is more fully discussed. It is, of course, not suggested that a purchaser claiming to rescind the contract at once for a breach of this kind cannot plead want of mutuality as a defence to the vendor's action for specific performance. All that is maintained is that the purchaser's right to rescind in such a case really rests on the common law principle that the vendor's obligation to show a good title at the time of the delivery of the abstract is a stipulation of which the *performance* is a condition precedent to the purchaser's liability under the contract; see below, Chap. XIV. § 1; Chap. XVIII. § 2. The vendor cannot successfully sue on the contract at law because of his default in performing this condition; and he will not be relieved in equity by being allowed to pursue the equitable remedy of specific performance, *except* where the vendor's breach is so trifling that the case is considered in equity to be a proper subject for specific performance with compensation at the vendor's suit (see above, p. 41, and below, Chap. XII. § 4), or *unless* the purchaser by his conduct in continuing negotiations for removing the objection he has taken elects to treat the contract as still subsisting.

Nature of breach occasioned by failure to show title at the proper time.

It is further submitted that failure to show title on delivery of the abstract is at common law in the nature of what is called an anticipatory breach of contract going to the whole consideration (see *Duke of St. Alban's* v. *Shore*, 1 H. Bl. 270, 278; *Michael* v. *Hart*, 1902, 1 K. B. 482, 490); for the vendor's failure to discharge this obligation puts it out of his power to perform his duty of conveyance at the proper time for completion, and is thus equivalent to a renunciation of the contract; see Atkinson, L. A., *Stickney* v. *Keeble*, ubi sup.; below, Chap. XVIII. § 2. A failure by the vendor to perform at the proper time one of his main duties under the contract (as the obligation to show a good title certainly is; see above, p. 32, n. (*b*)) entitles the purchaser, at his election, either to rescind the contract or to affirm it and sue for damages for the breach. And whenever the purchaser lawfully rescinds the contract, the entire contract, and every part of it, is avoided and the vendor is precluded from enforcing any stipulation in his favour contained therein; see *Flight* v. *Booth*, 1 Bing. N. C. 370, 377; *Re Terry and White's Contract*, 32 Ch. D. 14, 29; *Holliwell* v. *Seacombe*, 1906, 1 Ch. 426, 434; *Stickney* v. *Keeble*, ubi sup.; *Jureidini* v. *National British and Irish Millers Insurance Co., Ltd.*, 1915, A. C. 499; *Lee* v. *Rayson*, 1917, 1 Ch. 613; and consider *Soper* v. *Arnold*, 37 Ch. D. 96, 14 App. Cas. 429.

Lord Parker's theory was purely *obiter dictum*, the point decided in *Halkett* v. *Dudley* being that, after an order for specific performance has been made in an action brought by the vendor, the purchaser cannot rescind the contract for a defect in the vendor's title without the leave of the Court. And Lord Parker's alleged distinction between the purchaser's equitable right immediately to repudiate the contract and the common law right of rescission which he supposed to arise

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(*e*) See *Morley* v. *Cook*, 2 Hare, 106, 115; 7 Jur. 79, 80; *Southcomb* v. *Bp. of Exeter*, 6 Hare, 213, 216, 219, 220.

the objection, he may lose his right to insist on the objection and may find himself obliged to perform the contract (*f*). For if the purchaser show himself willing to go on with the contract, the vendor may get in the outstanding interests, though they should amount to the whole title, and he will then be in a position to enforce the specific performance of the contract. And if in such case the vendor bring an action for that purpose, it will be no defence to allege that he could make no title on the delivery of the abstract, or even by the time fixed for completion. For if the purchaser has continued to recognise the contract as binding, it will be sufficient to enable the vendor to enforce specific performance, if he can make a good title at the hearing (*g*) or even when the result of the usual inquiry as to title is certified (*h*). Besides this, if the contract contain the usual

on failure to show title by the day fixed for completion, is inapplicable in the case of an open contract (as *Halkett* v. *Dudley* was); for in that case the proper time for completion is when a good title has been proved; see above, pp. 27 and n. (*m*), 43. It is thought that this fact and the considerations, that to show his title the vendor is required by law to deliver a proper abstract thereof at his own expense and the actual proof of title is by way of verification of the statements in the abstract (like vouching an account rendered), coupled with the difference between matters of title and matters of conveyance clearly demonstrate that the proper time for showing title is on delivery of the abstract; see above, pp. 31, 32, 39, 97, 98, 106. And where a date is fixed for completion, it is submitted that this does not extend the proper time for showing title until that date, but rather contracts it, the vendor being bound *to have proved* his title before that date.

The question, whether a vendor, who has shown a defective title on delivery of the abstract but has got in a good title by the day fixed for completion, can recover damages from a purchaser, who has justifiably repudiated the contract before that day, was argued but not decided in *Bellamy* v. *Debenham,* 1891, 1 Ch. 412. Lindley, L. J., there said that he was not prepared to say that the purchaser would not be liable to damages in such a case; Lopes, L. J., expressed grave doubts whether such an action by the vendor would lie; and Kay, L. J., expressed the opinion that the contract had been validly rescinded and thereafter no claim by the vendor for damages could possibly be sustained. It is respectfully submitted that the doubts of Lopes, L. J., were well founded, and the pronouncement of Kay, L. J., that no damages could be recovered after the contract had been lawfully rescinded by the purchaser, was a correct statement of the rule of common law.

(*f*) *Brickles* v. *Snell,* 1916, 2 A. C. 599, 603, 606, where the property sold was subject to a mortgage repayable by instalments, but the mortgagee was willing to accept repayment of all the mortgage money at once, and the purchaser had been informed that the mortgage would be cleared off on completion and had acquiesced in this without objection; *Re Hailes and Hutchinson's Contract,* 1920, 1 Ch. 233.

(*g*) *Hoggart* v. *Scott,* 1 Russ. & My. 293; *Salisbury* v. *Hatcher,* 2 Y. & C. C. C. 54.

(*h*) *Eyston* v. *Simonds,* 1 Y. & C. C. C. 608; Fry, Sp. Perf.

stipulation enabling the vendor to rescind in case of insistence on an unwelcome requisition, and the purchaser negotiate with the view of obtaining the removal of an objection, which would have justified him in repudiating the contract at once, the purchaser runs the risk of the vendor's exercising his power to rescind and so escaping the liability of paying the purchaser's expenses as damages (*i*).

Requisitions as to the contents and manner of making the abstract.

We have already considered what documents of title the abstract should contain and the manner in which they ought to be abstracted (*j*). Any defects in these respects should of course be the subject of requisition. The purchaser's adviser must insist on being furnished with an abstract showing a complete chain of the conveyances or other documents dealing with the legal estate in the property purchased from the time of commencement of title down to that of the contract for sale. And whenever the abstract gives him notice of any equitable estate or interest in the premises, he must require the title to such estate or interest to be abstracted (*k*), and must see that the same has been ultimately got in or released or will be conveyed to the purchaser: unless, of course, the circumstances are such that the concurrence of the beneficiaries is unnecessary, as upon an ordinary trust for sale. It is his further duty to ascertain that each of the abstracted conveyances is at all points complete, so that it really has in law the effect which it purports to have. Thus he must consider whether the conveying parties have due capacity to convey the estate assured; if so, whether they have used an instrument proper and words apt to carry out their intention; and then whether the instrument is duly executed or perfected as required by law. And if he observe any deficiency, he should call for its rectification. If a document be abstracted in an improper manner (as constantly happens), conveyancing counsel ought to require the vendor to furnish a proper abstract sufficient to enable him to exercise his own judgment as to the effect of the words actually used. He ought not to rest satisfied

§§ 1366-9, pp. 607, 608, 3rd ed.; 580, 581, 4th ed.; 2 Dart, V. & P. 1058-1060, 5th ed.; 1178-1180, 6th ed.; 1065-1068, 7th ed.; and see *Murrell* v. *Goodyear*, 1 De G., F. & J. 432; *Halkett* v. *Dudley*, 1907, 1 Ch. 590, 597-600.

(*i*) See *Re Deighton and Harris*, 1898, 1 Ch. 458; *Procter* v. *Pugh*, 1921, 2 Ch. 256 (but as to this case, see the author's criticisms in 66 Sol. J. 119, 135; below, p. 173.

(*j*) Above, pp. 98-106.

(*k*) See above, pp. 101, 102.

with a mere statement of the effect of any material clause or document; for the very purpose of laying the abstract before him is that he should give his opinion on the effect of the deeds. And if he accept statements of the effect of clauses where he ought to be informed of the exact words used and judge of their effect himself, he is really laying a duty, which he ought to perform in person, on the gentleman who examines the abstract with the deeds. Owing to the unskilled and slovenly way in which abstracts are now too often prepared, counsel have to bear this constantly in mind. What clauses ought to be abstracted in full and what may be properly passed over with a mere statement has been considered above (*l*). We will merely give one constantly recurring example of the duty we have been pointing out. A proviso for reconveyance in a mortgage deed is now often abstracted in these words—proviso for redemption. And such abstracting is constantly allowed to pass either without comment or with the remark that it is presumed that this proviso is in the usual form. That however is exactly the point on which counsel's opinion is desired. A proviso for reconveyance is the only clause in a mortgage deed which effectively shows what charge on the property is thereby created, and on what terms that charge is redeemable, and it is also a limitation of the equitable estate in the property subject to the charge. All these matters are material to the title, even though a subsequent reconveyance from mortgagee to mortgagor appear on the abstract (*m*). The proviso therefore

As to abstracting a proviso for reconveyance.

(*l*) Pp. 103, 104.

(*m*) Of course mortgages are usually redeemable on payment of principal and interest by the original mortgagor to the original mortgagee, when reconveyance is to be made to the mortgagor according to his former estate. But, since persons not named as parties to indentures have been allowed to take benefits thereunder (see Wms. Real Prop. 164, and n. (*b*), 23rd ed.), there is nothing to prevent a proviso in a deed of mortgage between A. borrower and B. lender that on payment of principal and interest by A. to C., B. shall reconvey to D. in fee. In such case, if there were a subsequent reconveyance by B. to A. in fee on payment by A. to B., a purchaser acquiring title under these deeds would take with notice of the equities both of C. and D. This example is of course an extreme case; and the rule no doubt is that a mortgagor's equitable estate in the mortgaged lands shall not be altered by the terms of a proviso for redemption without a clear expression of an intention in that behalf (*Innes* v. *Jackson*, 16 Ves. 356; Co. Litt. 208 a, n. (1); *Stansfield* v. *Hallam*, 5 Jur. N. S. 1334; *Hastings* v. *Astley*, 30 Beav. 260; *Re Betton's Trust Estates*, L. R. 12 Eq. 553; *Re Byron's Settlement*, 1891, 3 Ch. 474): but such an intention may be clearly expressed in the proviso (see 16 Ves. 370, 371), and any variation in the limitation thereby made

should always be so abstracted as to enable the purchaser's counsel to judge for himself, from the exact words used, of its effect in these respects (*n*). And unless counsel insist on being furnished with such an abstract, he does not discharge his duty to his client.

Estate of grantee to uses.

Here the reader may be warned of a pitfall, which the writer has several times encountered in practice; namely, the omission, since the Conveyancing Act of 1881 took effect (*o*), to limit an estate in fee simple to a grantee to uses in deeds intended to take effect under the Statute of Uses. The consequence of this omission is that such grantee takes an estate for life only (*p*), and the uses declared are executed by the statute or turned into legal estates (*q*) only during the life of the grantee to uses and no longer (*r*). Uses declared of the inheritance in such circumstances are of course, generally speaking, valid in equity and enforceable as trusts: but the legal fee remains in

from the mortgagor's former estate raises a *question*, whether any alteration was intended; Davidson, Prec. Conv. vol. ii. pt. ii. pp. 38-43, 4th ed. An unusual proviso for redemption occurred in *Williams* v. *Morgan*, 1906, 1 Ch. 804.

(*n*) See 1 Prest. Abst. 149, 2nd ed., where note that the author appears to be speaking of a proviso for redemption in the old form making void the conveyance to the mortgagee on repayment (see Davidson, Prec. Conv. vol. ii. pt. ii. p. 31, 4th ed.; 5 Bythewood & Jarm. Prec. Conv. 3rd ed. by Sweet, 544, 555), and that, according to the principles there laid down, it should always be shown, in abstracting a proviso for *reconveyance*, to whom the reconveyance is limited to be made. It is not the right way to abstract a mortgage to set out the covenant for payment in full and then to abstract the proviso for conveyance as "proviso for redemption": though this error is often encountered. As a rule, there is no occasion to abstract this covenant; it should be simply stated as "covenant by A. for payment of [the mortgage money and interest]." But if the proviso for reconveyance be upon payment of the mortgage money and interest "pursuant to the covenant in that behalf hereinbefore contained," then the covenant ought to be fully abstracted to show the date fixed for redemption.

(*o*) Such an omission was not previously common, as it was the regular practice to limit estates to all grantees *and their heirs*. The mistake has generally arisen where use has been made of the statutory limitation to a grantee *in fee simple;* and the draftsman has forgotten that it is equally necessary to limit the lands to the grantee to uses in fee simple as to assure by apt words an estate of inheritance to the *cestui-que-use* intended to take the benefit of the conveyance.

(*p*) Wms. Real Prop. 117, 23rd ed.; *Meeking* v. *Meeking*, 1917, 1 Ch. 77.

(*q*) Ibid. 182-186, 23rd ed.

(*r*) Dyer, 186 a; *Jenkins* v. *Young*, Cro. Car. 230; *Meredith* v. *Joans*, ibid. 244; Sug. Pow. 149, 8th ed.; Williams on Settlements, 7; *Re Hunter and Hewlett's Contract*, 1907, 1 Ch. 46.

the grantor; and on a subsequent sale of the land by persons entitled under the uses, the purchaser must require the legal estate of inheritance to be conveyed to him by the original grantor, his heirs, executors, administrators or assigns.

Identity.

It is the duty of a conveyancer perusing an abstract on the purchaser's behalf to see that the vendor discharges his obligation of proving the identity of the property sold with that described in the various documents abstracted (*s*). The conveyancer must therefore carefully compare the abstracted parcels as he proceeds, and ascertain that the descriptions in the title deeds agree with each other and with the description in the contract. Where the abstracted descriptions wholly or partially fail to show the identity of the property comprised in the title deeds with that sold, further evidence of identity should be required, notwithstanding that the purchaser may have bought subject to the usual condition as to such evidence (*t*). The identity of the property sold with that comprised in the title deeds is the most important link in the whole chain of proof of the vendor's title; without evidence of such identity, the most perfect title shown by the deeds proves nothing. Purchasers cannot therefore be advised to dispense with such evidence (where they are entitled to require it), on the ground that they must bear the expense of it, if not in the vendor's possession (*u*).

Calling for evidence of facts.

It is the duty of the purchaser's counsel or solicitor, besides seeing that the documents which ought to be abstracted are abstracted and are properly abstracted, to note all facts material to the title stated on or appearing from the abstract, and to require them to be proved by the usual conveyancing evidence. What this is has been already sufficiently considered (*x*). But we may remark that, owing to the rule which now throws upon the purchaser the expense of procuring all evidence of title not in the vendor's possession (*y*), it is a convenient plan to frame requisitions calling for evidence of facts in the following

(*s*) Above, pp. 33, 59; Sug. V. & P. 413.
(*t*) See above, pp. 59, 66.
(*u*) See above, pp. 43, 124.
(*x*) Above, pp. 120 *sq.*
(*y*) Above, pp. 43, 124.

form:—"Has the vendor any evidence of any kind in his possession of (*the death, marriage, or other fact required to be proved*)? If so, he is required to produce such evidence. If not, purchaser reserve his right to call for the usual formal evidence of such (*fact*) at his own expense." As we have already pointed out (*z*), it is often material to a title to prove that some event has *not* happened. This should not be forgotten upon the perusal of the abstract; and the conveyancer should, in these cases, call for such evidence as he can require.

Death duties.

Another matter to be attended to on the perusal of the abstract is the incidence of the death duties. Whenever the death is stated of a person interested in the lands sold, it must be considered whether this death gave rise to a claim for legacy, succession, or estate duty in such a manner that the duty will, if unpaid, remain a charge on the land; and if so, the receipts for the duty payable, or in the case of estate duty a certificate of discharge, must be required to be produced or the claim must be required to be discharged. The subject of the death duties is more fully considered below (*a*).

Stamps.

It is not the practice for vendors to mark on the abstract what stamps are impressed on the various title deeds: but the purchaser's solicitor must ascertain this on the examination of the abstract with the deeds (*b*), and he should note in the margin of the abstract what stamps each abstracted document bears, or their absence, where a document required by law to be stamped is unstamped. If the abstract come to counsel after it has been compared with the deeds, he must of course consider whether all the abstracted documents appear to be rightly stamped. If he receive the abstract before the examination of the deeds, he should remind his client, in advising on the title, that it must be ascertained whether the abstracted documents are duly stamped. But whenever the opinion of counsel is to be taken on the title, the stamps on the abstracted documents should, if possible, be marked on the abstract before it is laid before counsel. If any document, which ought to be stamped, be unstamped or insufficiently stamped, the vendor should be required to procure it to be properly stamped; which, as we have seen, he is bound to do at his own expense (*c*).

(*z*) Above, p. 123.
(*b*) Above, p. 131.
(*a*) See Chap. XXI., below.
(*c*) Above, p. 119.

Inquiries respecting the property sold.

Besides the requisitions, properly so called, demanding the production of some particular piece of evidence to complete the title, it is generally desirable for the purchaser's advisers to make certain inquiries of the vendor respecting the property sold (*d*). Thus if an estate be sold under the usual condition that it is sold subject to all subsisting chief rents, easements, tenancies and tenants' claims, whether mentioned in the particulars of sale or not (*e*), inquiry should be made of the vendor whether there are any such rents, easements, tenancies or claims. This is a very pertinent question; for if it be omitted, the purchaser will have notice of any rights which he might have discovered by the inquiry (*f*); and, as we have seen, it is held that this general condition does not enable the vendor to enforce the contract specifically, if the property be subject to any rents, easements, tenancies or claims, which are serious incumbrances and were known to the vendor but omitted from the particulars (*g*). It is especially necessary to make inquiries as to the nature and extent of any tenants' claims for compensation where the land sold is subject to any tenancy which may give rise to a claim by the tenant for compensation under the Agricultural Holdings Acts, 1908 to 1920 (*h*). For in such cases the tenant may be entitled at the determination of his tenancy to compensation for improvements (*i*), or to compensation for disturbance under the Agriculture Act, 1920 (*k*); and he may be entitled to compensation for damage by game if notice of the claim is given within one month after the expiration of

Tenants' claims for compensation under the Agricultural Holdings Acts, 1908 to 1920.

(*d*) See Appendix (C), below, for a form of the inquiries which may usefully be made as supplemental to the requisitions on title.

(*e*) Above, p. 66.

(*f*) *Re Alms Corn Charity*, 1901, 2 Ch. 750; and see *Re Derby and Fergusson's Contract*, 1912, 1 Ch. 479, 487, 488.

(*g*) *Heywood* v. *Mallalieu*, 25 Ch. D. 357; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778; above, p. 66, n. (*b*); and see *Re Derby and Fergusson's Contract*, 1912, 1 Ch. 479, 488; *McGrory* v. *Alderdale Estate Co.*, 1918, A. C. 503, 507, 510, 512.

(*h*) Stats. 8 Edw. VII. c. 28; 2 & 3 Geo. V. c. 21; 10 & 11 Geo. V. c. 76 (the Agriculture Act, 1920). As to what is an agricultural holding within these Acts, see stat. 8 Edw. VII. c. 28, s. 48 (1); *Re Lancaster and Macnamara*, 1918, 2 K. B. 472. The provisions of the Agriculture Act, 1920, as to compensation for disturbance are extended to allotment gardens and to dwelling-houses standing on part of an agricultural holding and allowed by the tenant to be occupied by a workman employed by him in agriculture on the holding: stat. 10 & 11 Geo. V. c. 76, ss. 11, 12.

(*i*) Stat. 8 Edw. VII. c. 28, s. 1, amended by 10 & 11 Geo. V. c. 76, 1st Sched.

(*k*) Stat. 10 & 11 Geo. V. c. 76, ss. 10-13.

the calendar year, or the period of twelve months substituted by agreement therefor, in respect of which the claim is made (*l*). And in each case the compensation is recoverable from the person who is entitled as landlord to the rents and profits of the demised premises *at the time when the tenant's right to compensation arises*, unless such person be so entitled otherwise than for his own benefit, whether as trustee or in any other character, when the compensation is recoverable by a charge on the holding (*m*). So that if the purchaser should be the person so entitled to the rents and profits at the time when the tenant's claim arises, the compensation would be recoverable from him or be chargeable on the holding as his (*n*). And in every case it should be asked whether the property sold is subject to any easement or other right (*o*), or to any rentcharge, or to any quit-rent or other incident of tenure (*p*), and what outgoings there are in respect of the property sold. Land tax and tithe rentcharge, being general liabilities to which all lands are regularly subject, need not be expressly mentioned on a contract to sell land; it is understood that the purchaser will take subject to these liabilities, which are not regarded as incumbrances (*q*). And it is of course unnecessary to mention that the purchaser will have to pay the usual local rates, or property tax. If there be no other outgoings than these, the purchaser has no cause for objection: but the existence of rents or rentcharges (other than tithe rentcharge) not disclosed by the contract is a different matter. Quit rents, being incidents of tenure, are regarded in equity as a proper subject for compensation, not as a ground for resisting specific performance; and so are rentcharges of trifling amount (*r*). But the existence

Rents not disclosed by the contract.

(*l*) Stat. 8 Edw. VII. c. 28, s. 10.

(*m*) See stats. 8 Edw. VII. c. 28, ss. 1, 10, 14, 15, 35, 48; 10 & 11 Geo. V. c. 76, ss. 10-13 and 1st Sched.

(*n*) See *Re Derby and Fergusson's Contract*, 1912, 1 Ch. 479, 487, 488; *Bradshaw* v. *Bird*, 1920, 3 K. B. 144, 149-151.

(*o*) See *Pemsel* v. *Tucker*, 1907, 2 Ch. 191; above, p. 153, n. (*u*).

Freeholds may be subject to heriots.

(*p*) Onerous incidents, such as heriots, are sometimes attached to the tenure of freeholds; see *Copestake* v. *Hoper*, 1907, 1 Ch. 366, reversed, 1908, 2 Ch. 10; Wms. Real Prop. 59 and n. (*x*), 521, n. (*o*), 23rd ed.

Sale of land free of land tax or tithe rentcharge.

(*q*) Sug. V. & P. 322; 1 Dart, V. & P. 352, 5th ed.; 398, 399, 6th ed.; 393-395, 7th ed. If, however, the land be sold free of land tax or tithe rentcharge, the vendor is bound to furnish strict proof that the land is, as alleged, free from such liability, unless the contract provide that the purchaser shall require no evidence or accept less than the proper legal evidence of this; see Sug. V. & P. 321-323; above, p. 74.

(*r*) *Esdaile* v. *Stephenson*, 1 S. & S. 122; Sug. V. & P. 312; 2

of a rentcharge of substantial amount is an objection to the title (*s*); as is the existence of a considerable ground rent not mentioned in the particulars on the sale of houses held for a long term of years (*t*). Another inquiry useful to be made is whether the property sold is subject to any drainage or land improvement or other statutory charge. Drainage and land improvement charges of course principally affect agricultural land: but it must be remembered that land once occupied for cultivation is often built over, and that such charges may subsist after the agricultural aspect of the property has quite disappeared. And rentcharges may now be created under the Improvement of Land Act, 1864, and its amending Acts (*u*) for a very wide range of improvements, not exclusively affecting agricultural land. Agricultural land may also be liable to charges created under the Agricultural Holdings Act, 1883 or 1908 (*x*). In the case of town property or building land, charges may arise under Local Management or Improvement Acts, the Public Health Act, 1875 (*y*), or the Private Street Works Act, 1892 (*z*), for the expenses of paving, sewering, or lighting the adjoining streets or for other works ordered to be done by the proper authority (*a*). House property in London may be affected by a party wall notice under the London Building Act, 1894 (*b*); or the owner thereof may incur liability owing to a "dangerous structure" notice and an order consequent thereon under the same Act and the London Building Act, 1898 (*c*), or through being required to abate a nuisance

Statutory charges on land.

Dart, V. & P. 1078, 5th ed.; 1205, 6th ed.; 1093, 7th ed.; see above, p. 41.

(*s*) *Portman* v. *Mill*, 1 Russ. & My. 696; *Re Great Northern Rail. Co. and Sanderson*, 25 Ch. D. 788; Sug. V. & P. 313; above, p. 152.

(*t*) *Jones* v. *Rimmer*, 14 Ch. D. 588.

(*u*) See Chap. XII. § 2, below.

(*x*) Stat. 46 & 47 Vict. c. 61, ss. 29-32, repealed and replaced by 8 Edw. VII. c. 28, ss. 15-19, 49, amended and extended by 2 & 3 Geo. V. c. 21, and 4 & 5 Geo. V. c. 7.

(*y*) Stat. 38 & 39 Vict. c. 55, see ss. 150, 257; *Croydon Rural District Council* v. *Betts*, 1914, 1 Ch. 870.

(*z*) Stat. 55 & 56 Vict. c. 57.

(*a*) *Midgley* v. *Coppock*, 4 Ex. D. 309; *Re Bettesworth and Richer*, 37 Ch. D. 535; *Stock* v. *Meakin*, 1900, 1 Ch. 683; *Re Allen and Driscoll's Contract*, 1904, 2 Ch. 226; *Camberwell Corpn.* v. *Dixon*, 1910, 1 K. B. 424.

(*b*) *Carlish* v. *Salt*, 1906, 1 Ch. 335, as to which see the writer's criticism in 50 Sol. J. 611; *Selby* v. *Whitbread*, 1917, 1 K. B. 736.

(*c*) *Re Highett and Bird's Contract*, 1902, 2 Ch. 214; C. A., 1903, 1 Ch. 287; explained in *Re Allen and Driscoll's Contract*, 1904, 2 Ch. 231.

under the Public Health (London) Act, 1891 (*d*). And similar liability may be incurred elsewhere under the Public Health Act, 1875 (*e*). A dwelling-house may be subject to a closing order under the Housing, Town Planning, &c. Act, 1909 (*f*). A building may be subject to a demolition order under the Housing of the Working Classes Act, 1890 (*g*). And property situate within the improvement area under the London County Council (Improvements) Act, 1899, may be subject to an improvement rentcharge (*h*). In every case, therefore, in which any such liability may possibly be incurred, inquiry should be made whether any demand has been made, notice given, resolution passed, or order made, which may subject the property sold or its owner or occupier to some such charge or liability at some future time (*i*). Such charges or liabilities, when resulting in the payment of a lump sum of money, come under the head of outgoings, which the vendor ought to discharge in case they attach on the property sold or become payable before the time for completion of the sale (*k*). But if they do not attach as charges on the property or become actual liabilities due from its owner until after the date for completion, their discharge falls by law upon the purchaser (*l*); and he will not be able to escape them unless he can refuse to complete the purchase without receiving adequate compensation therefor. In the absence of fraudulent misrepresentation, however, he can only so refuse if the vendor were aware at the time of the sale of the fact which gave rise to the future liability, and did not disclose it to the purchaser, and the Court would consider that such non-disclosure amounted to a misrepresentation entitling the purchaser to rescind or to refuse to perform the contract (*m*).

(*d*) *Barsht* v. *Tagg,* 1900, 1 Ch. 231.

(*e*) Stat. 38 & 39 Vict. c. 55, ss. 94-104, 160, incorporating 10 & 11 Vict. c. 34, ss. 75-78.

(*f*) Stat. 9 Edw. VII. c. 44, s. 17; *Local Government Board* v. *Arlidge,* 1915, A. C. 120.

(*g*) Stat. 53 & 54 Vict. c. 70, s. 38; *Jackson* v. *Knutsford Urban District Council,* 1914, 2 Ch. 686.

(*h*) *Re Farrer and Gilbert's Contract,* 1914, 1 Ch. 125.

(*i*) See *Re Leyland and Taylor's Contract,* 1900, 2 Ch. 625; below, Chap. XII. § 2.

(*k*) See cases cited in notes (*p*), p. 46, (*a*), p. 165, above; below, Chap. XI. § 1.

(*l*) See *Re Leyland and Taylor's Contract,* 1900, 2 Ch. 625; *Re Allen and Driscoll's Contract,* 1904, 2 Ch. 226.

Re Farrer and Gilbert's Contract.

(*m*) See above, pp. 36, 37; below, Chaps. VI., XIII. § 1, XIV. § 1, XIX. § 3; and consider the case of *Re Farrer and Gilbert's Contract,* 1914, 1 Ch. 125, where the property sold became subject to

Agreement to complete without prejudice to future statutory liability.

And it should be noted that in such cases, if the purchaser agree to complete the purchase without prejudice to the question of his bearing the liability objected to, which is left to be determined by the Court, he will deprive himself of his only possible remedy in case it should be decided that the liability falls on him by law. For if he voluntarily complete the contract, he can no longer rescind it for innocent misrepresentation, or refuse to complete without compensation, and the Court will not then award to him the compensation, which he might have claimed as the price of the vendor's enforcing specific performance, but will only have regard to his liability at law (*n*). And with regard to charges, generally, the rule of course applies that the purchaser is entitled to have the property sold free from all incumbrances, except those, if any, subject to which he agreed to buy (*o*); but future statutory burdens, which have not attached as charges on the land sold or become actual liabilities due from its owner at the date for completion of the sale, are not considered to be incumbrances within the meaning of this rule, even though the event, which will ultimately cause the charge or liability to arise, happened before the sale (*p*). So that against such future burdens the purchaser's only weapon, if there be no *fraudulent* misrepresentation, is to refuse to complete the purchase as above mentioned. Hence the necessity of inquiring whether any event which will give rise to some such future burden has already happened. It is also useful to ask, on buying a house not detached, if the walls are party walls, and as to any suburban property, if any adjoining street or road has been taken over by the local authority, and on any sale, whether any wires or cables for telegraph, telephone, electric lighting or other purposes are laid under or over the property, and if the property sold is let or in hand, and who is in possession or receipt of the rents and profits thereof (*q*).

Future statutory burdens on land.

an improvement rentcharge under the London County Council (Improvements) Act, 1899, which attached thereon after the sale but before the date fixed for completion, and the vendor and purchaser were both unaware of this possible future burden when the land was sold, and it was held that the purchaser must take the land subject to the burden, as a legal incident attaching thereto, without compensation.

(*n*) See *Re Leyland and Taylor's Contract*, 1900, 2 Ch. 625; *Re Derby and Fergusson's Contract*, 1912, 1 Ch. 479, 487, 488.

(*o*) Above, pp. 39, 88.

(*p*) See cases cited above, nn. (*l*, *m*, *n*).

(*q*) See Appendix (C), below, for a form of the inquiries usually necessary.

Vendor bound to answer all relevant questions. *Re Ford and Hill.*

The general rule applicable to inquiries of the above nature is that the vendor is bound to answer all relevant questions with respect to the property sold (*r*): but the limits of inquiry are shown in the case of *Re Ford and Hill* (*s*) already mentioned. It was there held that a vendor need not answer the inquiry, Is there, to the knowledge of the vendor or his solicitor, any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract? This question the Court of Appeal held to be not so much a requisition as a searching interrogatory. As we have already pointed out (*t*), there is a clear distinction between putting questions to ascertain that the title shown on the abstract is fully proved and at all points complete, and interrogating the vendor whether he knows of any matter of title besides those stated on the abstract. Having regard to the practice already stated (*u*) of not disclosing purely equitable charges or interests on the abstract, where the purchaser may acquire a good title without notice of them, it seems obvious that such an interrogatory is objectionable. And the decision in *Re Ford and Hill* has been subsequently upheld; and it has been further considered that there is no duty incumbent on a purchaser of land to inquire if the land is subject to any equitable charge, such as that arising from restrictive covenants, which would prevent his obtaining such title or conveyance as he contracted for (*x*). But it is thought that the decision in *Re Ford and Hill* does not go further than this, and does not exonerate the vendor from the obligation of answering questions relevant to the issue between the parties, which is, has the vendor *proved* the title, which he has *shown on the abstract?* (*y*).

Counsel advising on title.

When the abstract is laid before counsel to advise thereon, he settles the necessary requisitions, and writes his opinion on the title according to the circumstances of the case; as that, if the requisitions be satisfactorily answered, a good title according to the contract will have been shown, or that some irremovable objection to the title appears. At the same time

(*r*) Above, p. 123.
(*s*) 10 Ch. D. 365.
(*t*) Above, p. 123, n. (*n*).
(*u*) Above, p. 101.
(*x*) *Wilkes* v. *Spooner,* 1911, 2 K. B. 473, 484, 486; and see *Re Chafer and Randall's Contract,* 1916, 2 Ch. 8, 15.
(*y*) See above, p. 151.

he usually advises what searches ought to be made. The subject of searches is reserved for subsequent consideration (*z*). Searches.

As we have seen (*a*), it is usually stipulated that the purchaser's requisitions on or objections to the title shall be sent in within a specified time after the delivery of the abstract, that in this respect time shall be of the essence of the contract, and that in default of any requisitions or objections so made, the purchaser shall be taken to have accepted the title. The time so limited only begins to run from the delivery of a perfect abstract (*b*). But if the abstract delivered be in accordance with the contract, the purchaser must be careful to send in his requisitions or objections within the time appointed, or he will lose his right to insist upon them (*c*). If, however, the abstract delivered show no title at all on the face of it, the purchaser may take this objection at any time, notwithstanding any such stipulation as the above, and although the day fixed for sending in requisitions be past. Thus in *Want* v. *Stallibrass* (*d*), two persons entered into a contract to sell land, stipulating that all objections and requisitions not sent in within fourteen days after the delivery of the abstract should be considered as waived. They then delivered an abstract from which it appeared that they were trustees of the property sold for a third person for life and after his death for sale; and they offered the concurrence of the tenant for life, apparently supposing that this would enable them to make a good title. The purchaser, after the fourteen days had expired, took the objection that, as the trust for sale did not arise until the death of the tenant for life, it was not presently exercisable, even with the tenant-for-life's concurrence (*e*). And it was held by the Court of Exchequer that the purchaser was entitled to recover his deposit, as the above-mentioned stipulation did not exonerate the vendors from their obligation of showing a good title, and it was apparent on the face of the abstract delivered by them that they had failed to perform this obligation. The vendors had in fact committed such a breach of contract as precluded them from

Time for making requisitions.

Failure to show any title on the abstract.

Want v. *Stallibrass.*

(*z*) See below, Chap. XII. § 2.
(*a*) Above, p. 56.
(*b*) Above, p. 57.
(*c*) See *Oakden* v. *Pike*, 34 L. J. (N. S.) Ch. 620; *Rosenberg* v. *Cook*, 8 Q. B. D. 162; *Pryce-Jones* v. *Williams*, 1902, 2 Ch. 517.
(*d*) L. R. 8 Ex. 175.
(*e*) Above, p. 154.

enforcing any stipulations in their favour therein contained, and discharged the purchaser from the performance of his part of the agreement (*f*). So in *Re Tanqueray-Willaume and Landau* (*g*), two persons sold land under the usual condition limiting the time for sending in requisitions or objections, and offered to make title as executors and trustees of a will selling under the power of sale implied by the testator's debts being charged on his real estate (*h*). After the time so limited had expired the purchaser took the objection that the words of the will did not create such a charge of debts. And it was held both by Kay, J., and the Court of Appeal that it was not too late to raise this objection, because (as they said) it "went to the root of the title." In other words, it was an objection that the vendors had failed on the face of their own abstract to show any title at all. It also appears that objection to anything, which is a matter of conveyance rather than of title (*i*), may well be made after the time limited for sending in requisitions on title has expired. Thus where the abstract shows a title in the vendor, subject to mortgages, the purchaser can of course require the mortgagees to concur in the conveyance, although he may not have sent in any requisition to that effect within the appointed time. For, as we have seen (*k*), a vendor is considered to have shown an acceptable title, if it appear from the abstract that on doing certain acts, which he can perform immediately and independently of others' consent, he will have the right to direct the conveyance of the whole estate contracted for. But by his own showing he has no good title except he do such acts. It is therefore a matter of course that he shall perform them; and it is unnecessary for the purchaser to address any requisition to this point (*l*). But it is of course the better plan to take any objection to the title in the manner and within the time prescribed by the contract, even though the objection be an absolute failure to show title on the face of the abstract (*m*). And it is also desirable to include in the requisi-

Re Tanqueray-Willaume and Landau.

Objection to matter of conveyance.

(*f*) See above, pp. 32, n. (*b*), 154, n. (*d*), and cases there cited; and the author's article in 66 Sol. J. 135, 137, 138.

(*g*) 20 Ch. D. 465.

(*h*) See Wms. Real Prop. 276, 277, and n. (*i*), 23rd ed.; below, Chap. VII.

(*i*) See above, p. 150; *Denny* v. *Hancock*, L. R. 6 Ch. 1, 8, 9, 13; 1 Dart, V. & P. 429, 5th ed.; 494, 6th ed.; 508, 7th ed.

(*k*) Above, pp. 150-152.

(*l*) *Re Gloag and Miller's Contract*, 23 Ch. D. 320, 327.

(*m*) See above, pp. 154-158, as to the danger of waiting before taking objection to the title.

tions to be sent in within the time limited a demand for the concurrence in the conveyance of any mortgagees or other incumbrancers whose charges are redeemable (*n*), or a demand for the performance before the time fixed for completion of any act, without which the vendor will not at the date for completion be enabled to convey what he contracted to sell, such as the completion of a contract of purchase under which the vendor is entitled (*o*), or the procurement of the lessor's licence to a sale of leaseholds not assignable without such licence (*p*). If the abstract show a good holding title, the purchaser cannot insist, after the time limited for sending in requisitions is gone by, on any objection thereto, which he might otherwise have taken (*q*).

What requisitions should be made and insisted on.

The conveyancer should, as a rule, be guided, in making requisitions on title, by the countenance he would expect his contention to receive from the Court in proceedings either to enforce specific performance or to recover the deposit (*r*). He should therefore make no frivolous or unnecessary requisitions (*s*), and he should be chary of asking for anything which he considers the other party not bound to concede. There are, of course, occasions when such requests may be properly made, and will be answered out of courtesy; and on making requisitions in the first instance it is legitimate to ask for what it is desirable that the purchaser should have (unless the requisition be plainly prohibited by the contract), although the vendor be not in strictness bound to comply. But if any requisition be met with a refusal, then the purchaser should not insist upon it, if he does not expect that his contention will be upheld by the Court.

Where the vendor may rescind.

If the contract contain the common stipulation allowing the vendor to rescind the contract in case the purchaser insists on any requisition which the former is unwilling to remove or

(*n*) 1 Dart, V. & P. 429, 5th ed.; 494, 6th ed.; 508, 7th ed. See above, p. 155, as to requiring the concurrence of any person, whose interest is not redeemable without his consent.
(*o*) See above, p. 150, and n. (*i*).
(*p*) See above, p. 153.
(*q*) *Pryce-Jones* v. *Williams*, 1902, 2 Ch. 517. As to the limits of the rule in *Want* v. *Stallibrass*, see L. Q. R. xix. 161.
(*r*) Above, pp. 36, 37.
(*s*) 1 Dart, V. & P. 428, 5th ed.; 493, 6th ed.; 506, 7th ed.

comply with (*t*), extra care must be exercised in selecting the requisitions which are to be pressed; and a conveyancer acting on behalf of a willing purchaser should only maintain his objections on points essential to the title. This is especially the case, where the stipulation is in the old common form giving the vendor the right to rescind, when the purchaser has insisted on an unwelcome requisition, without allowing to the latter any opportunity of withdrawing the requisition (*u*). For, as we have seen (*x*), the Courts are now inclined to allow a vendor to exercise a right of rescission according to the letter of the stipulation reserving it, provided only that he do so reasonably and in good faith and not arbitrarily or capriciously; and so long as the vendor has a good reason for rescinding (*y*), he is not obliged to inform the purchaser, in the notice to rescind, what that reason is (*z*). And if the condition do not give the purchaser the option of withdrawing the objection, on which he has insisted, the vendor may rescind without offering the purchaser any opportunity of retracting, and the latter cannot recover his rights under the contract by abandoning the objection after he has received the notice to rescind (*a*). Where the condition gives the right of rescission on an unwelcome requisition being *made* (not *insisted on*), the purchaser is in an even worse plight, as this gives the vendor the opportunity of rescinding on the first delivery of such a requisition (*b*); which he would not have if the condition of rescinding were that the purchaser should insist on the requisition (*c*). As we have seen (*d*), such conditions are now frequently drawn so as to allow the purchaser to withdraw the requisition within a limited time after he has received notice of intention to rescind; and when this is the case, there is no reason why requisitions, which are thought needful, should not be pressed, so long as notice to

(*t*) Above, p. 58.
(*u*) 1 Davidson, Prec. Conv. 564, 614, 4th ed.; 469, 522, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 233, 234, 2nd ed.
(*x*) See above, p. 58, and cases cited in note (*s*) thereto.
(*y*) See *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412, 420.
(*z*) *Re Starr Bowkett Bdg. Socy. and Sibun's Contract*, 42 Ch. D. 375.
(*a*) *Duddell* v. *Simpson*, L. R. 2 Ch. 102, 107, 108; *Re Dames & Wood*, 29 Ch. D. 626.
(*b*) *Re Starr Bowkett Bdg. Socy. and Sibun's Contract*, 42 Ch. D. 375.
(*c*) *Greaves* v. *Wilson*, 25 Beav. 290, 295, and cases cited in the two previous notes.
(*d*) Above, pp. 59, 65.

rescind is not given. Where the stipulation is that the vendor may rescind, if the purchaser shall insist on any requisition, which the vendor is, on the ground of expense or any other reasonable ground, unwilling to comply with, the vendor is not entitled to rescind unless there is some such ground for his refusal to comply with the requisition (*e*). In any case, a notice to rescind expressed to be given "without prejudice" is null and void (*f*).

Where the vendor has no title.

It was held in *Bowman* v. *Hyland* that a vendor, who has no title at all, cannot take advantage of a stipulation in the usual form enabling him to rescind, so as to escape the liability of paying the purchaser's expenses as damages (*g*). And in that case the purchaser was allowed to assert the vendor's breach of the contract and recover damages therefor (*h*); and it was considered that the terms of the common stipulation allowing the vendor to rescind (*i*) do not apply to the case in which the purchaser does not insist that the vendor shall remove any objection or comply with any requisition, but merely claims to repudiate the contract at once without any discussion (*j*). This doctrine, however, was not applied where a vendor having a beneficial interest, but not the entire legal title, sold in good faith, and a troublesome requisition to get in the outstanding legal estate was insisted on; notwithstanding that the defect of title appears to have been such as would have justified the purchaser in repudiating the contract at once on the ground that the vendor had failed to show a good title on the face of his own abstract (*k*). And where a purchaser claimed to repu-

(*e*) *Re Weston and Thomas's Contract,* 1897, 1 Ch. 244; see above, p. 85.

(*f*) *S. C.*

(*g*) *Bowman* v. *Hyland,* 8 Ch. D. 588, commented upon in *Re Deighton and Harris's Contract,* 1898, 1 Ch. 458, and *Re Jackson and Haden's Contract,* 1905, 1 Ch. 603, 607; 1906, 1 Ch. 412, 419, 423, 425.

(*h*) It is thought that in such a case the purchaser would equally be entitled at his election to rescind the contract; see above, p. 154, and n. (*d*).

(*i*) Above, pp. 65, 66.

(*j*) See 8 Ch. D. 589, 590.

(*k*) *Re Deighton and Harris's Contract,* 1898, 1 Ch. 458. The vendor had sold a lease, and the abstract only showed title to an equitable interest in an underlease (see above, pp. 93, n. (*i*), 149). It should be noted that the purchaser did not at once repudiate the contract on this ground; he negotiated, requiring the objection to be removed and so treated the contract as still subsisting; see above,

diate the contract unless the vendor removed an objection, which the Court afterwards held to be untenable, it was considered that the vendor was entitled to rescind the contract on the objection being pressed (*l*). But it has been definitely decided that, where the vendor has knowingly or recklessly (though without intention to defraud) made some material misrepresentation with respect to the property sold, so that he is unable to convey a property answering to that which he contracted to sell, he is not entitled to rescind the contract, under the common stipulation allowing him to rescind in case of his unwillingness to comply with some requisition, so as to deprive the purchaser of *his* rights either to rescind the contract for misrepresentation or to enforce its specific performance with compensation (*m*). And it is submitted that whenever a vendor fails on the face of his own abstract to show a good title, and the failure (though not entire) is such as involves a misdescription (whether in

Where the vendor has knowingly or recklessly made a material misrepresentation.

pp. 154-158. The Court moreover treated the objection as relating to a matter of conveyance, not of title. See also *Heppenstall* v. *Hose*, 33 W. R. 30.

(*l*) *Isaacs* v. *Towell*, 1898, 2 Ch. 285.

(*m*) *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412, of which case it is submitted that the statement in the text, rather than the headnote in the Law Reports, gives the exact point; see the remarks made in the judgments (pp. 421, 423, 425), showing that the vendors had in fact made what amounted in law to a wrongful misrepresentation; *Holliwell* v. *Seacombe*, ib. 426, 432 *sq.* The statement of the law in the text (p. 187, 2nd ed.) was approved by Eve, J., in *Re Milner and Organ's Contract*, 64 Sol. J. 463, 464, and P. O. Lawrence, J., in *Merrett* v. *Schuster*, 1920, 2 Ch. 240, 248. It is respectfully submitted that the judgments of Romer and Cozens-Hardy, L. JJ., in *Re Jackson and Haden's Contract*, who rested their decision on the fact that the vendors *knowing the exact facts* gave a misleading description of the property, state the gist of the case more correctly than that of Collins, M. R., who put his decision on the fact that the vendors *knowing the truth recklessly* misdescribed the property. And it is submitted knowledge is one element and recklessness is *an alternative* element of a wrongful misrepresentation; that what precludes the vendor from rescinding under the common condition in such a case is that he has made what is in law a wrongful misrepresentation, which entitles the purchaser to rescind the contract; and that after such rescission the entire contract is avoided and the vendor is precluded from enforcing any stipulation in his favour contained therein. See above, p. 154, and n. (*d*); and the author's articles in 66 Sol. J. 119, 135, criticising the decision of Sargant, J., in *Procter* v. *Pugh*, 1921, 2 Ch. 256, in which case the learned judge overlooked the point established by several cases not then cited to him that the existence of restrictive covenants involves such a misdescription of property knowingly represented to be free therefrom as entitles the purchaser to rescind the contract; see above, p. 153, n. (*u*). As to wrongful misrepresentation, see below, Chap. XIV. § 1; and as to the purchaser's right to specific performance with compensation, see above, pp. 41, 42, 60; below, Chap. XII. § 4.

title, area, or estate) of the property sold, and the misdescription is "in a material and substantial point, so far affecting the subject-matter of the contract that it might reasonably be supposed that, but for such misdescription the purchaser might never have entered into the contract at all" (*n*), and the misdescription was made either knowingly or recklessly and not by an innocent error, and the purchaser actually does rescind the contract at once for that cause and does not require the objection to be removed (*o*), then the vendor cannot take advantage of a clause in the contract reserving to him the right to rescind and so save his liability to pay the purchaser's expenses of investigating the title (*p*). But it is established that a vendor who has by an *innocent* error contracted to sell more (either in quantity, title, or estate) than he has the right to convey, may avail himself of a condition of this kind, so as to preclude the purchaser from enforcing specific performance with compensation or recovering damages for breach of the contract, or from rescinding the contract (*q*).

Innocent misrepresentation.

If the stipulation gives the right to rescind in case of insistence on a requisition or objection as to *title* only, the vendor will not be enabled to rescind if the purchaser insist on some requirement, which is a matter of conveyance, as the discharge of a mortgage (*r*). But it has long been usual expressly to extend the right to rescind to the case of objections as to matters of conveyance, and generally to objection in regard to any matter relating to the sale (*s*); and where the contract is so expressed, the Court will give effect to it (*t*). The usual condition expressly empowers the vendor to rescind, notwithstanding any negotiation or litigation in respect of the objection or requisition insisted on (*u*). Such negotiation on the vendor's part is therefore no waiver of his right to rescind (*x*). And

Objection as to matter of conveyance.

(*n*) *Flight* v. *Booth*, 1 Bing. N. C. 370, 377.
(*o*) See above, pp. 154, and n. (*d*), 173.
(*p*) See above, pp. 154, and n. (*d*), 173; and the author's articles in 66 Sol. J. 119, 135, criticising the decision and judgment of Sargant, J., in *Procter* v. *Pugh*, 1921, 2 Ch. 256.
(*q*) See above, p. 59, n. (*y*).
(*r*) *Re Jackson and Oakshott*, 14 Ch. D. 851; see above, p. 150.
(*s*) 1 Dart, V. & P. 160, 5th ed.; 1 Davidson, Prec. Conv. 564, 614, 4th ed.
(*t*) *Re Deighton and Harris's Contract*, 1898, 1 Ch. 458.
(*u*) Above, p. 65.
(*x*) *Duddell* v. *Simpson*, L. R. 2 Ch. 102; 1 Davidson, Prec. Conv. 564, 4th ed.; 470, 5th ed.; 1 Dart, V. & P. 161, 5th ed.; 183, 184, 6th ed.; 177, 7th ed.

the vendor is enabled to rescind, although the condition contain no reference to pending litigation, during the continuance of any proceedings by the purchaser either for specific performance or to enforce the contract at law, and whether by action or vendor and purchaser summons (*y*): but not after final judgment has been given in any such proceedings (*z*). If the vendor take proceedings to enforce the contract at law or in equity, he waives his right to rescind: though he may revert to it, if he procure his proceedings to be effectually discontinued at his own cost before they come on to be heard (*a*).

Waiver of objections or requisitions.

A purchaser may of course waive any objection or requisition which he has taken or made as to title or otherwise. Such waiver may be either express or implied from any acts or conduct inconsistent with the maintenance of the objection (*b*). The express waiver of an objection or requisition needs no comment: though it may be observed that the acceptance of the title shown by the abstract is no waiver of the right to require the verification of the abstract (*c*), or of any objection not disclosed by the abstract (*d*). Whether the waiver of any objection is to be implied from the purchaser's acts is a question of fact to be determined by the consideration of all the circumstances of the case (*e*). The evidence usually offered to establish an implied waiver is the performance, without raising any objection, of acts which the purchaser is not bound to perform, or which a prudent purchaser does not usually perform until a good title has been duly proved (*f*); like entry into possession, or payment of the whole or part of the purchase money (*g*). With regard

(*y*) *Hoy* v. *Smithies*, 22 Beav. 510; *Duddell* v. *Simpson*, L. R. 2 Ch. 102; *Isaacs* v. *Towell*, 1898, 2 Ch. 285. But the condition does not oust the jurisdiction of the Court to order the vendor to pay the costs of any such proceedings; *Re Spindler and Mear's Contract*, 1901, 1 Ch. 908.

(*z*) *Re Arbib and Class's Contract*, 1891, 1 Ch. 601.

(*a*) *Warde* v. *Dickson*, 5 Jur. N. S. 698; *Gray* v. *Fowler*, L. R. 8 Ex. 249; and see the case cited in the previous note, where the original summons was taken out by the vendor.

(*b*) See *Simpson* v. *Sadd*, 4 De G., M. & G. 665; Sug. V. & P. 342 *sq.*; 1 Dart, V. & P. 430 *sq.*, 5th ed.; 495 *sq.*, 6th ed.; 508 *sq.*, 7th ed.

(*c*) *Southby* v. *Hutt*, 2 My. & Cr. 207.

(*d*) *Blacklow* v. *Laws*, 2 Hare, 40, 47; Alderson, B., *Att.-Gen.* v. *Sitwell*, 1 Y. & C. 570.

(*e*) *Burroughs* v. *Oakley*, 3 Swanst. 159, 168.

(*f*) Above, p. 43.

(*g*) See the cases cited in the following notes; *Haydon* v. *Bell*, 1 Beav. 337.

to taking possession, if the contract for sale expressly or impliedly provide that the purchaser shall be let into possession before completion, no waiver can be implied from the fact of the purchaser so taking possession (*h*). And so it is if after the contract the parties agree that the purchaser shall go into possession without prejudice to his right to require a good title (*i*). But if the purchaser take possession, otherwise than under an express provision in the contract, after an abstract of title has been delivered, but before completion, that is *primâ facie* a waiver of all objections to title (*k*) appearing on the abstract (*l*), though not of other objections (*m*). Waiver of objection may also be implied from the purchaser's conduct, though he were in possession when he bought, or took possession before completion under an express provision in the contract or without prejudice to his right to a good title; as if he remain a long time without raising any objection as to title, and exercise decisive acts of ownership over the lands sold, like letting them, making alterations in buildings or cutting timber, or accept time in regard to payment of the purchase money (*n*), or remain in possession after having had notice of an irremovable objection to the title (*o*). But as has been observed, in each case the whole of the circumstances must be considered, so that entry into possession or exercise of acts of ownership is by no means conclusive evidence of waiver. The question is, whether the purchaser intended to waive the particular objection. Such acts therefore are no evidence of waiver if accompanied by insistence on the objection. Thus where negotiations as to title were continued after the purchaser had both taken possession and acted as owner, it was held that no waiver of objections to title could be implied (*p*). Long delay in raising objections may also be evidence of waiver (*q*).

(*h*) *Dixon* v. *Astley*, 1 Mer. 133, 134; *Stevens* v. *Guppy*, 3 Russ. 171, 183; *Bolton* v. *London School Board*, 7 Ch. D. 766.

(*i*) See *Burroughs* v. *Oakley*, 3 Swanst. 159, 169.

(*k*) But not of objections, which are matter of conveyance (above, pp. 150, 151), as that the vendor shall release the property from mortgages; *Re Gloag and Miller's Contract*, 23 Ch. D. 320, 327.

(*l*) *Burnell* v. *Brown*, 1 J. & W. 168; *Bown* v. *Stenson*, 24 Beav. 631, 637.

(*m*) *Turquand* v. *Rhodes*, 37 L. J. Ch. 830.

(*n*) See *Fleetwood* v. *Green*, 15 Ves. 594; *Dixon* v. *Astley*, 1 Mer. 133; *Margravine of Anspach* v. *Noel*, 1 Madd. 310.

(*o*) *Re Gloag and Miller's Contract*, 23 Ch. D. 320.

(*p*) *Burroughs* v. *Oakley*, 3 Swanst. 159, 169, 171.

(*q*) *Pegg* v. *Wisden*, 16 Beav. 239.

Purchaser desiring to go on where the abstract shows an objection to the title.

Where the abstract shows such an objection to the title as involves a material misdescription of the property sold and would justify the purchaser in rescinding the contract (*r*), but he desires to complete the sale, if possible, it is frequently advisable for him to claim at once that he is entitled to treat the contract as broken and recover his deposit and expenses, and to say that he definitely asserts this right and rescinds the contract accordingly (*s*), but to state that, subject and without prejudice to his strict rights in this respect, he is willing to buy the property described in the contract at the price therein mentioned, if the objection can be removed, and to make provisional requisitions accordingly, stipulating that such requisitions are made and all subsequent negotiation with respect to the matter must be taken to be carried on subject and without prejudice to and reserving his strict rights as above asserted. It is thought that if he so assert and reserve his rights, the vendor cannot rescind under the common condition, if any requisition so made prove unwelcome (*t*). The purchaser must, however, bear in mind that in taking this course he gives the vendor the opportunity of retiring from the bargain, though only on the terms of returning the deposit, if any, and paying the purchaser's expenses of investigating the title down to the date of the claim to repudiate the agreement (*u*), and he precludes himself from enforcing the specific performance of the contract. But in most cases the vendor's desire to obtain the contract price for his land, and his anxiety to avoid paying the purchaser's expenses, are sufficiently great to make the course suggested effective.

(*r*) See above, pp. 174, 175.

(*s*) See *Re Hailes and Hutchinson's Contract,* 1920, 1 Ch. 233; above, p. 154.

(*t*) See above, pp. 65, 158, 171 *sq.*

(*u*) See below, Chap. XIX. § 2. If after this date the parties negotiate but fail to arrive at an agreement to complete the sale, the purchaser cannot of course recover his expenses of such subsequent negotiation.

CHAPTER VI.

OF STIPULATIONS LIMITING THE OBLIGATION TO SHOW A GOOD TITLE.

We will now turn our attention to various particular points, which constantly arise in advising on title. And first, as to the effect of stipulations limiting the vendor's obligation to show a good title. We will begin by remarking that the enactment substituting forty years for sixty, in the absence of stipulation to the contrary, as the time of commencement of title (*a*) appears to alter the rule of law on this point rather than to introduce into open contracts a new term depending for its efficacy on the contracting parties' consent. So that where a vendor shows forty years' title, he is considered to show title for the full period required by law, and the purchaser's rights are not regarded as being limited by special stipulation (*b*). But the other statutory limitations of the purchaser's right to require a good title do not appear to have the like effect. Thus the enactment in the Vendor and Purchaser Act, 1874 (*c*), removing the necessity of showing the freeholder's title on the grant or assignment of a lease, has been held to have no greater force than a special stipulation in the contract to the same effect, and so not to exempt the grantee or assignee of the lease from receiving constructive notice of the lessor's title (*d*). And, as we shall see, the provisions of the Conveyancing Act, 1881 (*e*), exonerating the vendor of lands held by underlease less than forty years old from the obligation of showing the title to any leasehold reversion, and relieving a vendor of enfranchised copyholds of the necessity of showing the title to make the

The statutory limitations.

(*a*) Stat. 37 & 38 Vict. c. 78, s. 1; above, pp. 91, 92.
(*b*) See *Re Marsh and Earl Granville*, 24 Ch. D. 11; above, p. 91. *Re Cox and Neve's Contract*, 1891, 2 Ch. 109, 117, 118.
(*c*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 1); above, pp. 91, 92, 94.
(*d*) *Patman* v. *Harland*, 17 Ch. D. 353, 359.
(*e*) Stat. 44 & 45 Vict. c. 41, s. 3 (1, 2); above, pp. 92, 94.

enfranchisement, receive the same construction as special stipulations in similar terms. The rule fixing forty years before the date of the contract as the time of commencement of title is, as we have seen (*f*), very frequently superseded in practice by a special stipulation that the title shall commence with some instrument of more recent date. But whether the period for which title has to be shown be defined by the general rule or by special stipulation, the vendor's obligation is subject to the further limitation introduced into contracts for sale by sect. 3, sub-sect. 3 of the Conveyancing Act, 1881 (*g*). This enactment, the exact effect of which it is of the first importance to understand, runs as follows:—

Sect. 3 (3) of Conveyancing Act, 1881.

"A purchaser of any property shall not require the production, or any abstract, or copy, of any deed, will, or other document dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment or otherwise."

The incorporation or exclusion of these provisions in or from the contract is, however, a matter depending on the expression of the intention of the parties (*h*). And it is enacted (*i*) that nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section or any of them, specific performance of the contract would not be enforced against him by the Court. The statutory provisions therefore have no greater

(*f*) Above, pp. 16, 79.
(*g*) Stat. 44 & 45 Vict. c. 41.
(*h*) Sect. 3, sub-s. 9.
(*i*) Sect. 3, sub-s. 11.

force than express stipulations to the same effect, and will receive the same construction as such stipulations (*j*). We have already noticed the manner in which special conditions of sale are construed in actions for specific performance (*k*). We will now show particularly in what manner the effect of the above provisions is practically limited, notwithstanding the sweeping character of the expressions used therein.

The effect of the above enactment.

The first observation to be made is that this enactment is no qualification of the main rule that the vendor must show a good title, that is, that he must prove his right to convey what he sold. It refers entirely to the subordinate rule that the title for the last forty years, or whatever less period may be agreed upon, shall *primâ facie* be evidence of a good title (*l*). If therefore the title shown in accordance with the agreement be defective, as where it discloses incumbrances irremovable without other persons' consent (*m*), the purchaser is not precluded by the above enactment from objecting to the title, notwithstanding that the incumbrances were created before the time fixed for the commencement of title. The leading authority for this is *Phillips* v. *Caldcleugh* (*n*). In that case, the plaintiff contracted to purchase of the defendants a house described as a freehold residence, subject to certain conditions of sale, and paid a deposit. The 5th condition provided that the abstract of title to the property should commence with a conveyance dated the 17th of April, 1860, and no purchaser should investigate or take objection in respect of the title prior to the commencement of the abstract. By the deed of the 17th of April, 1860, as abstracted, the premises were conveyed to Matthews and Beckett in fee subject to the covenants and conditions contained in an indenture of the 2nd of March, 1850, recited therein. The plaintiff made this requisition—"The vendors must show, notwithstanding any of the conditions of sale, that the covenants and conditions contained in the indenture of the 2nd of March, 1850, referred to in the first abstracted deed, do not in any manner affect the property, and that the purchaser incurs no liability in respect of them." To which the defendants made

Phillips v. *Caldcleugh.*

(*j*) *Nottingham Patent Brick and Tile Co.* v. *Butler,* 15 Q. B. D. 261, 272; 16 Q. B. D, 778.
(*k*) Above, pp. 36-38.
(*l*) Above, pp. 89, 90.
(*m*) Above, p. 151.
(*n*) L. R. 4 Q. B. 159.

answer, "The purchaser's solicitors are referred to the 5th condition of sale." After some fruitless negotiations the purchaser brought an action to recover his deposit. And it was held that he was entitled to recover it. For the plaintiff had contracted to purchase a freehold house, which must mean a freehold free from all incumbrances; and the abstract delivered only showed a title to a freehold house incumbered by certain covenants. And it was held that the 5th condition of sale did not prevent the purchaser from taking this objection: for it merely restricted the length of time for which the purchaser could require a title to be shown; and did not absolve the vendor from the obligation of showing a good title to the freehold of the property sold, free from incumbrances, from the time at which it had been agreed that the title should commence. It should be noted that this case was an action at law brought before the Judicature Acts, and in no way depended upon any of the equitable doctrines peculiar to the granting or refusing the specific performance of a contract (*o*). Again, in *Nottingham Patent Brick and Tile Co.* v. *Butler* (*p*), land was bought under a contract providing that the title should commence with an indenture dated the 20th of May, 1868, and incorporating the above enactment, and further providing that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. The vendor's solicitor represented to the purchaser, before the contract was signed, that the property was not subject to restrictive covenants: but the purchaser, after having signed the contract, discovered from other sources than the vendor that there were restrictive covenants affecting the property and created by a title deed of earlier date than the 20th of May, 1868. He thereupon refused to complete, and brought an action to recover his deposit. The vendor counterclaimed the specific performance of the contract, and alleged in the Court of Appeal that he himself had bought without notice of the restrictive covenants, and so could give the purchaser an unincumbered title. The vendor was, however, aware of the existence of the covenants, having discovered them, as he said, by looking, after his purchase, at the deed creating them. It was held both by Wills, J. and the Court of Appeal that the purchaser was not precluded by the

Nottingham Patent Brick and Tile Co. v. *Butler.*

(*o*) Above, pp. 36, 37.
(*p*) 15 Q. B. D. 261; 16 Q. B. D. 778.

above provisions of the Conveyancing Act from insisting on his right to an unincumbered freehold title. The vendor's claim for specific performance was rejected, not only on the ground of his solicitor's misrepresentation, but also because the vendor, knowing of the defect in the title, did not call the purchaser's attention thereto in the contract, and so could not avail himself of the special condition that the property was sold subject to anything affecting the same (*q*). His claim to oblige the purchaser to take a title from him as a *bonâ fide* purchaser for value without notice of the covenants was dismissed for the reason that the fact, that he was such a purchaser, was disputable, and Courts of Equity regard titles depending on proof of facts, which may be immediately disputed and so land the purchaser in litigation, as too doubtful to force upon an unwilling purchaser. The return of the deposit was also ordered in both Courts: but the Court of Appeal rested the purchaser's right to this relief entirely upon the misrepresentation by which he was induced to enter into the contract; without which the Court considered that he would have been bound at law by the contract. Another case illustrating the effect of the above enactment and depending on the same principle as the case last cited is *Re Marsh and Earl Granville* (*r*). It was there stipulated that the title to a certain freehold estate should commence with a deed less than forty years old. This deed turned out to be a voluntary conveyance: but no mention of this effect had appeared in the conditions of sale. It was held in a vendor and purchaser summons taken out by the vendor that the purchaser was justified in refusing to complete the contract, unless title were shown for the full period of forty years; notwithstanding that the conditions of sale provided that the title earlier than the date of the voluntary conveyance should not be investigated or objected to. This was so decided on the ground that conditions curtailing a purchaser's right to require a good title as defined by law must be fair and explicit, or the vendor shall not enforce the specific performance of the contract according to the limiting conditions. And the Court further considered that, on a stipulation for the commencement of title with a deed *less* than forty years old, the purchaser is entitled to assume that the agreed root of title is a conveyance for

Re Marsh and Earl Granville.

(*q*) See above, pp. 66, n. (*b*), 163-167.
(*r*) 24 Ch. D. 11.

valuable consideration. As we have seen (*s*), this judgment does not appear to oblige a vendor to put forward such a conveyance as the root of title when he agrees to show title for the full period required by law. In all other respects, however, the principles of *Phillips* v. *Caldcleugh* and *Re Marsh and Earl Granville* are constantly applicable whenever it is stipulated that title shall commence with an instrument of a particular date, whether that date be or be not less than forty years before the contract. And whenever such a deed fails in any of the requisites of a good root of title (*t*), the purchaser is entitled to call for further evidence to supply the defect; and he is not precluded by the above enactment from insisting on this right to further evidence, even though proof can only be supplied by the investigation of the earlier title. For as we have seen (*u*), the vendor's obligation is to show title to the whole estate contracted to be conveyed in the lands sold throughout the entire period of forty years or such less time as may be agreed on. He must therefore prove title to the whole of such estate at the beginning and thenceforward until the end of such period. Thus on the sale of freeholds he must prove a seisin in fee free from incumbrances at the commencement of and throughout the number of years for which he has bound himself to show title; and he incurs a similar obligation on the sale of copyholds (*v*) or leaseholds (*w*).

Vendor disclosing a defect of title.

If a vendor of his own accord allow the purchaser to inspect title deeds of earlier date than the time agreed on for commencement of title, and the purchaser so discover a defect in the title, the latter may insist on such defect as a bar to specific performance, notwithstanding the provisions of the above enactment (*x*).

Misrepresentation.

Any misrepresentation as to facts, however innocently made, will preclude the vendor from enforcing the specific performance of the contract with the limitations imposed by the above enactment. On this point the leading case is now *Re Banister, Broad*

(*s*) Above, p. 100.
(*t*) Above, p. 98.
(*u*) Above, p. 99.
(*v*) *Sellick* v. *Trevor,* 11 M. & W. 722.
(*w*) *Waddell* v. *Wolfe,* L. R. 9 Q. B. 515.
(*x*) *Smith* v. *Robinson,* 13 Ch. D. 148.

v. *Munton* (*y*), where, upon the sale of a farm by order of the Court, a condition was made requiring the purchaser to assume that E. B. was seised of and entitled to the entire property sold in fee simple in possession, free from incumbrances, in 1835 and up to and at her death, stating that it was not known and could not be explained how E. B. acquired the property, and expressly stipulating that no other title than as above should be required or inquired into. It was shown that it was within the knowledge of the vendor that E. B. was not seised of the property free from incumbrances in 1835, and how E. B. acquired the property. The vendor was held to have acted in perfect good faith, inasmuch as he had furnished a statement of the facts known to him, upon which the condition had been drawn by one of the conveyancing counsel of the Court. But it was held that, the statement which the purchaser was required to assume as correct being untrue to the knowledge of the vendor, the former had been induced to make the contract by a misrepresentation; for he was entitled to presume that what was so stated was true. It was considered therefore that the vendor could not oblige the purchaser to take a title as limited by the condition, and the purchaser might decline specific performance unless the vendor would show a good title irrespective of the condition. But it was declared that the purchaser, having bought under such a condition, was entitled to require a good holding title only and not a good marketable title.

Re Banister, Broad v. *Munton.*

The reader will observe that, as the above enactment has no greater force in binding either party than an express stipulation to the same effect, it is construed with the aid of decisions given before the Act upon the construction of contracts containing similar express provisions. In arriving at such decisions, the question generally considered was whether the terms of the contract simply exonerated the vendor from the obligation of showing, or answering any requisition as to, the title prior to some specified time (*z*), or whether they bound the purchaser to refrain altogether from investigating such prior title and so obliged him to accept the title shown without objection, even though a ground of objection were ascertained

Construction of express stipulations before the Conveyancing Act, 1881.

(*y*) 12 Ch. D. 131; see also *Harnett* v. *Baker,* L. R. 20 Eq. 50.

(*z*) *Shepherd* v. *Keatley,* 1 C., M. & R. 117; *Darlington* v. *Hamilton,* Kay, 550; *Waddell* v. *Wolfe,* L. R. 9 Q. B. 515.

from other sources than the vendor (*a*). It appears from the above-mentioned case of *Nottingham Patent Brick and Tile Co.* v. *Butler* (*b*) that the stipulation made by sect. 3, sub-sect. 3, of the Conveyancing Act (*c*) does not bind the purchaser to refrain from investigating the earlier title in other sources than the vendor; and special stipulation must be made, if such inquiry by the purchaser is intended to be precluded. The reader will have noticed, however, that this enactment expressly precludes objection as well as inquiry by the purchaser with regard to the earlier title; and it may be asked whether these expressions are absolutely without effect. They certainly do not preclude the purchaser from resisting specific performance on account of any objection to the title, which was known to the vendor when he made the contract, but not disclosed thereby (*d*). And, as we have seen (*e*), they do not, even at law, preclude a purchaser from objecting to a title subject to a present defect, which is apparent on the face of the abstract, though arising out of the earlier title. But if a good title were shown by the abstract for the time for which title was agreed to be shown, and there were no active misrepresentation on the vendor's part (*f*), it appears that a purchaser would not be allowed to rely upon an objection barred by the letter of the above enactment in proceedings to recover his deposit (*g*). And if the objection arising out of the earlier title were unknown to the vendor when he sold, the case is altogether different and is not covered by any of the authorities cited; and it must not be assumed, without argument, that in such circumstances the purchaser would not be precluded by the above enactment from resisting specific performance, if he discovered the objection elsewhere (*h*).

(*a*) *Hume* v. *Bentley*, 5 De G. & Sm. 520; *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515, 519; *Jones* v. *Clifford*, 3 Ch. D. 779, 790.
(*b*) 16 Q. B. D. 778; above, p. 182. (*c*) Above, p. 180.
(*d*) *Nottingham Patent Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778, 786, 789.
(*e*) Above, p. 181.
(*f*) See above, p. 183.
(*g*) See above, pp. 37, 38, 83, and cases stated below, pp. 189-191.
(*h*) On this point see the writer's argument in his Conveyancing Statutes, Appendix A., p. 531, written before the case of *Nottingham, &c.* v. *Butler*. The position there taken by the writer with regard to defects known to the vendor (p. 535, last sentence) is justified by the judgment of the C. A. in this case; 16 Q. B. D. 786, 789. As to the position of a vendor selling honestly and in good faith without knowledge of a defect in his title, see *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 2 Ch. 211.

Special stipulation as to title.

It is of course open to any vendor by special stipulation either to exonerate himself altogether from the obligation of showing title or to bind the purchaser to accept any partial or defective title; and if such stipulations be fair and explicit, so that the purchaser cannot reasonably be misled with regard to the title he is contracting to take, they will be enforced by the Court in granting specific performance at the vendor's suit (*i*). Thus purchasers have been ordered to perform specifically contracts obliging them to take such title as the vendors had (*k*). Such a stipulation precludes objection to the vendor's title, but does not relieve him of the obligation of abstracting and verifying it (*k*). But a stipulation that the vendor shall not be required to show any title, whether to the whole or to any part of the lands sold, is undoubtedly valid, and exempts him from the necessity of abstracting or otherwise proving his title (*l*). As we have seen (*m*), however, the last-mentioned stipulation alone would not preclude objection to the title on account of a defect discovered from other sources; but if words were added obliging the purchaser to refrain from any independent investigation of the title, he would certainly be bound thereby, both at law and as regards the specific performance of the contract. On this point the leading authority is *Hume* v. *Bentley* (*n*), where leaseholds were sold under a condition that the lessor's title would not be shown and should not be inquired into (*o*). The vendor sued for specific performance, and on the usual reference (*p*) as to title, the purchaser took the objection that the lease, which had been granted by a canal company, was void, as it appeared from the Acts of Parliament incorporating the company that the company had no power to acquire land or grant leases. It was held however that a vendor may lawfully stipulate that the purchaser shall accept the title shown without objection or inquiry; and that the words used amounted to such

Hume v. *Bentley.*

(*i*) Above, p. 56; see *Re Haedicke and Lipski's Contract,* 1901, 2 Ch. 666.

(*k*) *Freme* v. *Wright,* 4 Madd. 364; *Keyse* v. *Hayden,* 20 L. T. O. S. 244; *Hume* v. *Pocock,* L. R. 1 Ch. 379, 385. See also *Wilmot* v. *Wilkinson,* 6 B. & C. 506; *Tweed* v. *Mills,* L. R. 1 C. P. 39; Sug. V. & P. 337; 1 Dart, V. & P. 150, 151, 5th ed.; 168-170, 6th ed.; 163-165, 7th ed.; 1 Davidson, Prec. Conv. 544, 4th ed.; Fry, Sp. Perf. § 1323, p. 591, 3rd ed.; p. 565, 4th ed.

(*l*) See *Southby* v. *Hutt,* 2 My. & Cr. 207, 212, 213.

(*m*) Above, p. 185.

(*n*) 5 De G. & Sm. 520; 16 Jur. 1109.

(*o*) See above, p. 185.

(*p*) Above, p. 152, n. (*o*).

a stipulation and precluded the purchaser from looking into the lessor's title for any purpose. And the purchaser's objection was disallowed. As we have already noted (*q*), when it is intended that the purchaser shall take lands sold subject to some particular defect of title known to the vendor, such as an easement, restrictive covenants, a mortgage or a rentcharge, the stipulation obliging him to do so must clearly call his attention to the incumbrance, to which he is to submit: otherwise he will not be bound to specific performance according to the letter of the contract. The cases to which we have referred upon considering the effect of sect. 3 (3) of the Conveyancing Act of 1881 (*r*) also illustrate the effect given at law and in equity to special stipulations as to title.

A purchaser with notice that a good title cannot be made.

Here we may notice a case in which a purchaser may be obliged to take lands subject to some defect of title or particular incumbrance, without any written stipulation to that effect. Where the vendor's obligation to show a good title is not an express term of the contract, but is merely implied, as in the case of an open contract (*s*), it is open to him to prove that the purchaser bought with notice (though given by word of mouth only) that a good title could not be made, either wholly or partially; and the vendor will then be exonerated from showing title to the extent indicated by such notice (*t*). But if the vendor allege that his obligation to show a good title has been so modified, he must prove it at the hearing of any action brought to enforce the contract; for he is not permitted to adduce evidence, that the purchaser bought with such notice, on the reference as to title in an action for specific performance (*u*).

(*q*) Above, pp. 66, n. (*b*), 164, 183.
(*r*) Above, pp. 181 *sq.*
(*s*) Above, p. 31.
(*t*) *Ogilvie* v. *Foljambe,* 3 Mer. 53, 64; *Re Gloag and Miller's Contract,* 23 Ch. D. 320, 327; *Ellis* v. *Rogers,* 29 Ch. D. 661, 666, 671, 672; Fry, Sp. Perf. § 377, p. 172, 3rd ed.; pp. 161, 162, 4th ed. The above statement of the law (from the second edition of this book, p. 204) was cited with approval by Cozens-Hardy, M. R., and Warrington, L. J., in *Alderdale Estate Co.* v. *McGrory,* 1917, 1 Ch. 414, 418, 420, reversed in H. L. only on the point above stated in the next sentence in the text; and the law so laid down was confirmed by the judgment of Finlay, L. C., *McGrory* v. *Alderdale Estate Co.,* 1918, A. C. 503, 508. It appears that the case of *Re Highett and Bird's Contract,* 1903, 1 Ch. 287 (as to which see below, Chap. X. § 2), is not to be taken as conflicting with this rule; see Romer, L. J., *Re Allen and Driscoll's Contract,* 1904, 2 Ch. 226, 231.
(*u*) *McGrory* v. *Alderdale Estate Co., Ltd.,* 1918, A. C. 503.

And where the vendor has expressly contracted to show a good title, he is not permitted to modify the terms of his written agreement by giving oral evidence of any such notice (*x*).

Difference in purchaser's position when resisting specific performance, and when seeking to recover deposit.

We will now consider the authorities establishing the difference, to which we have before referred (*y*), in the position of a purchaser under a special contract as to title when he is resisting specific performance in equity and when he is seeking to recover his deposit at law; a difference, which is owing to the fact that there are defences available against proceedings for specific performance (such as unfairness, including innocent misrepresentation not amounting to a cause for rescinding the contract, and hardship), which cannot be set up in proceedings to enforce the contract at law (*z*). In *Best* v. *Hamand* (*a*), a railway company sold land as superfluous land under conditions that the purchasers should assume (without proof) that everything had been done by the company to enable them to sell the land as surplus land, and that the deposit should be forfeited if the purchasers failed to comply with the terms of the agreement. The purchaser discovered from other sources that some of the adjoining owners had not waived their right of pre-emption; and insisted on this objection to the title (*b*). The vendors thereupon claimed the deposit as forfeited; and it was held by the Court of Appeal, reversing the decision of Hall, V.-C., that the purchasers were not entitled to recover it, as they had in effect contracted to take the vendor's title without objection on this point, and had not therefore abided by the terms of the contract. But if in this case the vendors had sued for specific performance, it appears that the purchasers might have resisted their claim, except on condition of the vendors showing that they could give at least a good holding title; for the vendors, having required the purchasers to assume the truth of a statement which the vendors knew to be false, had made a misrepresentation

Best v. *Hamand*.

(*x*) *Cato* v. *Thompson*, 9 Q. B. D. 616; Cozens-Hardy, M. R., and Warrington, L. J., *Alderdale Estate Co.* v. *McGrory*, 1917, 1 Ch. 414, 417, 418, 420; Finlay, L. C., *McGrory* v. *Alderdale Estate Co.*, 1918, A. C. 503, 508.

(*y*) Above, pp. 37, 83.

(*z*) Above, pp. 37, 38; below, Chap. XIX. § 3.

(*a*) 12 Ch. D. 1.

(*b*) Under sect. 128 of the Lands Clauses Act, 1845 (stat. 8 & 9 Vict. c. 18), before superfluous land can be sold by a railway company, it must be offered to the owner of the lands from which it was originally severed, and in default of this, to the owners of the adjoining lands.

sufficient to preclude them from enforcing specific performance according to the letter of the contract (*c*). So in *Nottingham Patent Brick and Tile Co.* v. *Butler* (*d*), we have seen that land was bought subject to the condition that it was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, and it was held that, the land being subject to restrictive covenants known to the vendor but not disclosed at the time of sale, the vendor could not enforce specific performance: but it was intimated that the purchaser would not have been able to recover his deposit, if he had not bought on the faith of the vendor's solicitor's representation that the land was free from such covenants. Again, in *Re Davis to Cavey* (*e*) property was sold as "leasehold business premises" under conditions that the title should commence with the conveyance to the vendors, and that no objection should be made in respect of anything contained in the lease. No information as to the contents of the lease was given and no opportunity of inspecting it. The purchaser discovered after the sale that the lease contained covenants prohibiting the tenant from carrying on any trade or business on the premises. Stirling, J., in a vendor and purchaser summons taken out by the purchaser, held that, regard being had to the sale of the property as business premises, the purchaser was entitled to have an assignment of property where he could carry on any business (*f*), and so the vendor had not shown such a title as the purchaser was compelled to accept. But he declined to order the return of the deposit, pointing out that *Best* v. *Hamand* (*g*) showed that the right to recover a deposit at law was not governed by the same considerations as the right to resist specific performance in equity. He therefore left the purchaser to bring an action at law, if so advised, for the return of his deposit. In *Re National Provincial Bank of England and Marsh* (*h*), land was sold under the condition that the title should commence with a conveyance dated in 1869, and the prior title should not be required, investigated or objected to. The purchaser discovered from other sources that the grantor in the conveyance of 1869 derived title under a will which, the purchaser was advised, conferred a life estate only.

Re Davis to Cavey.

Re National Provincial Bank of England and Marsh.

(*c*) *Re Banister, Broad* v. *Munton,* 12 Ch. D. 131; above, p. 185.
(*d*) Q. B. D. 778; above, p. 182.
(*e*) 40 Ch. D. 601.
(*f*) See above, p. 41.
(*g*) Above, p. 189.
(*h*) 1895, 1 Ch. 190.

The purchaser insisted on this objection, and took out a vendor and purchaser summons for the return of his deposit. North, J., admitted that the vendors might have a difficulty in enforcing specific performance, but held that the purchaser had no right to the return of his deposit, as the stipulation plainly barred independent investigation of and all objection to the earlier title (*i*), and the purchaser had not therefore observed the terms of the contract. Finally, in *Re Scott and Alvarez's Contract* (*k*), land held by underlease was sold under a condition that the purchaser should make no objection or requisition in respect of the intermediate title between the underlease and an assignment thereof in 1891, but should assume that such assignment vested in the assignees a good title for the residue of the term. The purchaser's solicitor nevertheless asked questions as to this intermediate title of the vendor's solicitor, who gave him certain information tending to cast suspicion on such title. The vendor's solicitor asserted that this was done without prejudice to the special condition. The purchaser maintained that, as the vendor had given information as to the intermediate title, he could not oblige the purchaser to accept the title shown without clearing up the suspicions raised (*l*). The purchaser took out a vendor and purchaser summons in support of this contention, which prevailed with Kekewich, J., but was disallowed in the Court of Appeal. The Lords Justices held that, to enable the purchaser to escape from the stringent condition into which he had entered, it was not enough to show that the title was suspicious, but he must prove it to be bad; and as it was made to appear to them that the purchaser's main objection was removed by the Statute of Limitations, they held that he had failed in such proof. After this, the purchaser discovered that gross frauds had been committed with respect to the intermediate title, and that several documents, on which the vendor's title depended, were forgeries; and he declined to complete the purchase. The vendor, who was not in any way implicated in the frauds, then brought an action for specific performance, to which the purchaser by leave counterclaimed to review the order of the Court of Appeal made in the summons, on the ground of the subsequent discovery of fresh material facts. Kekewich, J., not only dismissed the vendor's action for specific

Re Scott and Alvarez's Contract.

(*i*) Above, p. 186. (*k*) 1895, 1 Ch. 596; 2 Ch. 603.
(*l*) See above, p. 184.

performance, but ordered him to return the deposit. But, on the case being again taken to the Court of Appeal, it was considered that at law the purchaser was strictly bound by the contract into which he had chosen to enter, and could not therefore recover his deposit, as there had been no breach of contract by the vendor. But it was declared that the specific performance of the contract in equity depended on different considerations; and on this point the judgment was affirmed for the reason that, as the vendor had no holding title at all, but was liable to instant ejectment, his title was not such as the Court would oblige an unwilling purchaser to take.

Recovery of deposit under agreement that title shall commence with some specified instrument, which turns out not to be a good root of title.

The above decisions raise a question as to the purchaser's right to recover his deposit, where he has entered into a contract that the title shall commence with a particular instrument less than forty years old (*m*), and it turns out that this is not a good root of title. What is the effect at law of an agreement that the title shall commence with an instrument, of which the nature is not specified? Take the case of a sale of freeholds in fee subject to a condition that the title shall commence with a particular deed dated twenty years before the contract, and without any stipulation precluding investigation of the earlier title other than is contained in the Conveyancing Act of 1881 (*n*). Have the parties agreed that that deed, whatever it may be, shall be the root of title, or have they merely stipulated that proof of title as from the date of that deed shall be accepted, instead of proof of forty years' title, as proof of a good title? (*o*) It is submitted that the latter is the true meaning of the condition, and that it does not exonerate the vendor from the obligation of proving title to the whole estate contracted to be sold at the beginning as well as at the end of the period for which title is to be shown (*p*). Thus if the deed mentioned in the condition should turn out to be merely a lease for years, or the conveyance of an equity of redemption, the purchaser would be entitled to call for further evidence of title (*q*). And it is submitted that in requiring such evidence he would not commit any breach either of the express condition or of the stipulation incorporated in

(*m*) Above, p. 56.
(*n*) Stat. 44 & 45 Vict. c. 41, s. 3 (3); above, p. 180.
(*o*) See above, pp. 89-91.
(*p*) See above, pp. 98, 99.
(*q*) Above, pp. 183, 184.

the contract by the Conveyancing Act. For he would not be asking for production of evidence of the title *prior* to the time stipulated for commencement of title; which the statutory stipulation precludes him from demanding (*r*). What he would really be requiring is proof of the title *at the date* of the specified deed to such part of the estate contracted to be sold as was not dealt with by that deed. It is submitted that a more stringent stipulation than the supposed condition would be necessary to exonerate the vendor from the obligation of producing such proof; and further that the vendor cannot be discharged from this obligation merely because the only available evidence happened to be the production of the earlier title (*s*). If this view be correct, the vendor would not be entitled to retain the deposit if he refused to furnish the evidence required (*t*). A distinction however must be drawn between the instance given above and a case where the nature of the instrument, with which the title is to commence, is plainly described. Thus if it were agreed that the title should commence with an Indenture of such a date, "being a settlement on marriage of the property sold, subject to certain mortgages therein recited," there would be good ground to contend that the purchaser agreed to accept that deed as the root of title. Again, a difference is to be observed in cases like *Re Marsh and Earl Granville* (*u*), where it is agreed that the title shall commence with a specified deed, and that deed does show title to the whole estate contracted for, but it is objected to for some other reason, as because it is a voluntary conveyance. In that case the purchaser did not abide by the contract in requiring evidence of the earlier title; and it does not appear that he could have recovered his deposit. The proceedings were throughout treated as a vendor's action for specific performance. And the doctrine there laid down, that a purchaser agreeing that the title shall commence with a deed less than forty years old is entitled to assume that the deed is a conveyance for valuable consideration (*x*), is applicable only in proceedings for specific performance and not in an action on

(*r*) Above, p. 180.
(*s*) See *Phillips* v. *Caldcleugh*, above, p. 181; *Re Cox and Neve's Contract*, 1891, 2 Ch. 109, 117, 118.
(*t*) See *Re Cox and Neve's Contract*, ubi sup., in which case the vendor was ordered to return the deposit.
(*u*) 24 Ch. D. 11; above, p. 183.
(*x*) See above, pp. 98, 183.

the contract at law. As previously recommended (*y*), purchasers buying by private contract should avoid raising any question as to the retainer of the deposit by requiring the vendor to guarantee the instrument, with which the contract is to commence, to be a good root of title.

Purchaser under usual condition as to identity requiring further evidence.

Again, it may be asked whether a purchaser will be entitled to recover his deposit, if, having bought under the usual condition as to evidence of identity (*z*), he require further evidence of identity on the ground that the descriptions in the title deeds fail, either wholly or partially, to prove the identity of the property bought with that to which the deeds relate. It appears however that the usual condition (*z*) as to evidence of identity does not altogether discharge the vendor from the obligation of proving identity; it merely saves him from the necessity of giving evidence of identity independent of the title-deeds. And if the deeds themselves fail to show identity, it does not appear that the vendor performs his contract at law (*a*). If so, he cannot claim to retain the deposit.

Course to adopt in making requisitions.

The proper course for the purchaser's counsel to adopt in matters of this kind appears to be to require the vendor, in the first instance, to show such a title and furnish all such evidence as he would be obliged to show or produce in an action for specific performance at his own suit. And the purchaser's advisers should endeavour to secure compliance with such requisitions by their diplomatic conduct of the negotiations. If this fails to attain its object, the purchaser should be careful to insist only on such requisitions as the vendor is obliged to comply with at law. And he should withdraw all requisitions for any evidence of title, which the vendor would have to produce to obtain specific performance at his own suit, but need not show in order to discharge his contract at law. As we have seen (*b*), unless the vendor seek actively to enforce the specific performance of the contract, the purchaser has no means of obliging him to furnish such evidence.

Conditions requiring assumptions of fact.

It has been shown (*c*) that a condition of sale, requring the purchaser to assume without proof the truth of some fact or

(*y*) Above, p. 84.
(*z*) Above, pp. 59, 66.
(*a*) See the authorities cited in note (*c*) to p. 59, above.
(*b*) Above, p. 83.
(*c*) Above, pp. 184, 185.

facts stated, is not binding, as regards the specific performance of the contract, if the vendor know the statement made to be untrue. But if the vendor believe the statement made to be true and have no reason to suppose that it is incorrect, the condition is fully binding on the purchaser, although it do not appear from the contract what defect of title the assumption required is intended to cover (*d*).

Position of purchaser buying under special conditions as against persons claiming adversely to the vendor.

If a purchaser buy under conditions limiting his right to inquire into the vendor's title, he will of course have no protection against any *legal* estates or rights, adverse to the vendor's interest, which might have been discovered by a complete investigation of the title. But this liability arises from the fact that *legal* estates or interests in land are rights directly enforceable against the land into whosoever hands it may come (*e*); and it is no defence against persons seeking to enforce such rights that the purchaser made the fullest investigation of the vendor's title. With regard to *equitable* estates or interests adverse to the vendor's title, the case is different; and if the purchaser obtain the legal estate from the vendor without notice of such estates or interests he will not be bound thereby (*f*).

Purchaser not investigating title has constructive notice of equities which he might have discovered by inquiry—

But a purchaser, who buys under conditions limiting his right to investigate the title, has constructive notice of all equitable incumbrances, which he would have discovered if he had inquired into the vendor's title for the period during which the title is required to be shown by law (*g*). For it is considered that a purchaser is bound to inquire into his vendor's title; and he is not allowed to escape the consequences of such inquiry, as regards notice of equities apparent on the face of the title, by contracting not to investigate the title. The reason of this is

(*d*) *Re Sandbach and Edmondson's Contract,* 1891, 1 Ch. 99; *Blaiberg* v. *Keeves,* 1906, 2 Ch. 175.

(*e*) See Wms. Real Prop. 2, 3, 66, 183, 629, 23rd ed.; below, Chap. XI. § 2 (Assignment by Party to the Contract).

(*f*) See last note.

(*g*) *Worthington* v. *Morgan,* 16 Sim. 547; *Peto* v. *Hammond,* 30 Beav. 495; *Wilson* v. *Hart,* L. R. 1 Ch. 463; *Carter* v. *Williams,* L. R. 9 Eq. 678; *Patman* v. *Harland,* 17 Ch. D. 353; *Re Cox and Neve's Contract,* 1891, 2 Ch. 109, 117, 118; C. A., *Re Nisbet and Potts' Contract,* 1906, 1 Ch. 386, 404, 408, 410 (but as to the decision in this case, see the writer's criticism in 51 Sol. J. 141, 155); *Perham* v. *Kempster,* 1907, 1 Ch. 373, 379; see also *Oliver* v. *Hinton,* 1899, 2 Ch. 264; *Berwick* v. *Price,* 1905, 1 Ch. 632; *Walker* v. *Linom,* 1907, 2 Ch. 104; cf. *Hudston* v. *Viney,* 1921, 1 Ch. 98; and see below, Chap. VIII. § 1.

obvious. If a purchaser under restrictive conditions were able to plead purchase of the legal estate without notice against a prior equitable incumbrancer, it would always be in the power of any one who held land subject to an equitable incumbrance, to deprive the incumbrancer of his right by a sale under conditions prohibiting inquiry into title; and a purchaser under special conditions is supposed to take all risks and to pay a diminished price in consequence (*h*). But a purchaser agreeing to accept a restricted title is not affected with constructive notice of any equitable incumbrances, which he would *not* have discovered if he had investigated the title for the full period for which the vendor would have been bound to show it under an open contract (*i*).

but not of equities which he would not have so discovered.

(*h*) See the cases cited in the previous note. Fry, J., appears to have lost sight of these principles in holding in *Kettlewell* v. *Watson*, 21 Ch. D. 685, 708, that persons who purchased very small pieces of land without investigating the title, were not affected with constructive notice of an equitable incumbrance, which the usual investigation of title would have disclosed. There was no appeal from his decision on this point: but his views do not appear to have been accepted by the C. A. See 26 Ch. D. 501, 508.

(*i*) *Carter* v. *Williams*, L. R. 9 Eq. 678; *Wilkes* v. *Spooner*, 1911, 2 K. B. 473, 484, 487; and see *Pearce* v. *Bulteel*, 1916, 2 Ch. 544, 555.

CHAPTER VII.

OF DEVOLUTION ON DEATH.

Devolution on death before 1898.

DEVOLUTION of lands on death is a fact of title which is constantly brought before the conveyancer. As the law on this subject was greatly altered in the year 1897 it is deserving of special consideration. We will begin by giving a short summary of the law in force before the 1st of January, 1898, when the Land Transfer Act, 1897 (*a*), took effect.

Dower and curtesy.

The first thing to be remembered in considering who were rightly entitled to succeed to lands on a former owner's death is the law of dower and curtesy. For the purpose of the investigation of title, it may still be necessary to have regard to the old law of dower, which continued to regulate the dower of all widows who were married before or on the 1st of January, 1834 (*b*). It will be remembered that, at common law, the wife's dower was paramount to every alienation by the husband, whether in his lifetime or by will, of any lands on which the claim had attached: but that in modern times the wife's claim was generally prevented from attaching by the assurance of lands on a purchase to uses to bar dower (*c*). The dower of women married after the 1st of January, 1834, is governed by the Dower Act, 1833 (*d*). This statute deprives the widow of dower out of any land, of which her husband has absolutely disposed in his lifetime or by will (*e*); and postpones her right to dower to all partial estates and interests and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable (*f*). It enables the husband to bar

Dower.

Dower Act, 1833.

(*a*) Stat. 60 & 61 Vict. 65; see sect. 25.
(*b*) Stat. 3 & 4 Will. IV. c. 105, s. 14.
(*c*) See Wms. Real Prop. 350 *sq.*, 424, 23rd ed.
(*d*) Stat. 3 & 4 Will. IV. c. 105.
(*e*) Sect. 4.
(*f*) Sect. 5. The opinion has been judicially expressed that, not-

his wife's right to dower out of any land by declaration to that effect contained in any deed of his or by will (*g*), or to restrict her right to dower by his will (*h*); and it also deprives the widow of dower out of any land, in which her husband has devised any estate or interest for her benefit, unless a contrary intention be declared by his will (*i*). The general effect of these provisions is that a widow can only claim dower out of lands, which her husband has suffered to descend; and even out of such lands her right to dower may be barred, restricted or postponed (*k*). But it must not be forgotten, in advising on title, that on the death of a tenant of freeholds in fee intestate or on the death of a tenant in tail, his widow may still be entitled to dower.

Curtesy.

Curtesy at common law was of course an estate commencing in the wife's lifetime on the birth of issue that might inherit (*l*). But as regards estates of inheritance held on trust for the wife's separate use or held by her as her separate property under the Married Women's Property Act, 1882, the husband has no right to possession or receipt of the rents and profits during his wife's lifetime, and he can only claim an estate by the curtesy, if entitled by the birth of issue, on the wife's death and intestacy;

withstanding the above words, the widow's dower is paramount to the claims of her late husband's creditors, who have not in his lifetime obtained a charge on his lands; Romilly, M. R., *Spyer* v. *Hyatt,* 20 Beav. 621; Wood, V.-C., *Jones* v. *Jones,* 4 K. & J. 361. And this opinion was followed in the Irish case of *Re McMackin,* 1909, 1 I. R. 374, in which the point was actually so decided. In neither of the two former cases, however, was the expression of this opinion necessary to the decision. *Spyer* v. *Hyatt* was a case of freebench; and it had been previously decided that the Dower Act has no application to freebench; *Smith* v. *Adams,* 18 Beav. 499; 5 De G., M. & G. 712; so Lord Romilly's *dictum* was peculiarly gratuitous. *Jones* v. *Jones* was the case of a mortgage by the husband. It is respectfully submitted that, according to the ordinary meaning of the words used in the Act, a man's lands are "subject or liable" to his debts after his death, notwithstanding that his creditors have no charge thereon; for by the Administration of Estates Act, 1833 (stat. 3 & 4 Will IV. c. 104), a man's real estate was made assets to be administered in courts of equity for the payment of his just debts; see *Price* v. *Price,* 35 Ch. D. 297, 305; *Re Moon,* 1907, 2 Ch. 304, 310. And by the Land Transfer Act, 1897, s. 2 (3), a man's real estate was made subject to the same liabilities for debt as his personal estate; see below, p. 212. But unless the point shall be reconsidered in the Court of Appeal, conveyancers must of course have regard to the above judicial opinion and decision.

(*g*) Sects. 6, 7.
(*h*) Sect. 8.
(*i*) Sect. 9.
(*k*) See Wms. Real Prop. 354, 355, 23rd ed.
(*l*) Ibid. 334, 23rd ed.

and not in case she has disposed of the estate in her lifetime or by will (*m*).

Succession to freeholds after death before 1898.

Subject to the law of dower and curtesy, on the death before the year 1898 of a tenant of freeholds who was also the beneficial owner, his estate devolved as follows according to its nature:—An estate in fee simple passed directly to the devisee, if it should have been disposed of by will (*n*), or in case of intestacy, to the heir of the last purchaser (*o*). In case of a total failure of the heirs of the last purchaser, the estate descended to the heir of the person last entitled thereto (*p*): but if there were no such heir, it escheated to the lord of the fee, and usually to the Crown, in default of any mesne lord being able to prove his title (*q*). It does not fall within the scope of the present work to set out all the rules for the descent of a fee to the heir of the last purchaser or person last entitled (*r*): but the conveyancer may be reminded of the interest given by the Intestates' Estates Act, 1890 (*s*), to the widow in the real estate of any man dying intestate after the 1st of September, 1890, and leaving a widow but no issue. Estates tail, if not barred in the tenant's lifetime (*t*), descended to the heir in tail *per formam doni* (*u*). And where lands are subject to the custom of gavelkind or borough-English, it must not be forgotten that the descent of estates tail, as well as estates in fee simple, is regulated by the custom (*x*). Life estates of course cease on death: but estates *pur autre vie* passed, if devised, to the devisee, and otherwise either to the heir as special occupant, or if there were no special occupant to the deceased tenant's executors or administrators; and in the last-mentioned

Escheat.

Estates tail.

Gavelkind; borough-English.

Estates *pur autre vie.*

(*m*) Wms. Real Prop. 341-346; *Cooper* v. *Macdonald,* 7 Ch. D. 288; *Hope* v. *Hope,* 1892, 2 Ch. 336.

(*n*) Ibid. 75—77, 257, 258, 276, 23rd ed.

(*o*) That is, of course, under the Inheritance Act, 1833, regulating the succession on deaths occurring after the year 1833. On deaths before 1834, lands descended according to the common law rules to the heir of the person last seised; Wms. Real Prop. 87, 240-242, 23rd ed.

(*p*) This was by virtue of stat. 22 & 23 Vict. c. 35, ss. 19, 20, passed 13th August, 1859; Wms. Real Prop. 249, 23rd ed.

(*q*) Ibid. 56—58, 255.

(*r*) See for these Wms. Real Prop. 240 *sq.*, 23rd ed.

(*s*) Stat. 53 & 54 Vict. c. 29; see *Re Twigg's Estate,* 1892, 1 Ch. 579; *Re Charriere,* 1896, 1 Ch. 912; *Re Heath,* 1907, 2 Ch. 270; *Re Morgan,* 1920, 1 Ch. 196; Wms. Real Prop. 246, 355, 356, 23rd ed.

(*t*) See Wms. Real Prop. 115, 23rd ed.

(*u*) Ibid. 245.

(*x*) Ibid. 59-61.

event they became distributable in the same manner as personalty (*y*).

Copyholds.

Freebench; curtesy.

Devise of copyholds.

Customary heir.

Copyholds given to the tenant and the heirs of his body.

Copyholds held beneficially in customary fee simple or tail may by special custom be subject to the widow's freebench or the husband's curtesy (*z*). Subject to these rights, copyholds held in fee are devisable without any surrender to the use of the tenant's will (*a*): but the devise only gives the devisee a right to be admitted, similar to the right of a surrenderee, and he does not become completely tenant until admittance, a ceremony usually involving the payment of a fine to the lord (*b*). In default of being devised, copyholds in fee descend to the customary heir, that is, to the person entitled by the custom of the manor in which the lands lie, to succeed to them as heir; and he acquires the estate directly on the ancestor's death, though he is not completely tenant as regards the lord until admittance (*c*). And it appears that, even when copyholds are devised by will, the estate descends to the customary heir, pending the devisee's admittance (*d*). Copyholds given to the tenant and the heirs of his body in a manor, where there is no custom to entail, being held for an estate similar to a fee simple conditional at common law, are alienable and therefore devisable on the birth of issue: but if not devised, they descend to the customary heirs of the donee's body only (*e*). Copyholds held to the tenant and the heirs of his body of a manor, where there is a custom to entail, appear not to be devisable by will, if the entail be not duly barred in the tenant's lifetime (*f*); and unless the entail be so barred, they will descend to the customary

(*y*) That is, of course, under the provisions of the Wills Act, replacing those of stat. 14 Geo. II. c. 20, and the Statute of Frauds; see Wms. Real Prop. 138, 139, 23rd ed.; *Re Inman,* 1903, 1 Ch. 241.

(*z*) Wms. Real Prop. 538, 539, 23rd ed.

(*a*) That is, since stat. 55 Geo. III. c. 192, passed 12th July, 1815; see Wms. Real Prop. 529, 530, 23rd ed.

(*b*) See *Garland* v. *Mead,* L. R. 6 Q. B. 441; Wms. Real Prop. 509, 510, 529, 530, 23rd ed.

(*c*) Wms. Real Prop. 500, 518, 23rd ed.

(*d*) *Garland* v. *Mead,* L. R. 6 Q. B. 441; but see Davidson's Concise Precedents, 606, n. (*a*), 19th ed.

(*e*) 1 Scriv. Cop. 69, 3rd ed.; *Rowden* v. *Maltster,* Cro. Car. 42; Wms. Real Prop. 513, 23rd ed.

(*f*) See stat. 3 & 4 Will. IV. c. 74, ss. 40, 50. Before this Act, it was held that in manors where entails were barrable by surrender, they might be barred by a surrender to the use of the tenant's will; *Carr* d. *Dagwell* v. *Singer,* 2 Ves. sen. 603; *Moore* v. *Moore,* ib. 596, 602; 1 Scriv. Cop. 71, 3rd ed.

heir in tail (*g*). Copyholds held for an estate *pur autre vie* are devisable; if not devised, they descend to the heir of the grantee, if the estate were given to him and his heirs: otherwise they pass to the executors or administrators and are distributable as personalty (*h*).

Estate *pur autre vie* in copyholds.

Leaseholds for years were always devisable as chattels. As chattels, too, they devolved upon the deceased tenant's executors or administrators and were applicable in payment of his debts (*i*). And the executors or administrators, or any one of them (*k*), always had the same powers of disposition over the deceased person's leaseholds as over his other chattels (*l*); and so might sell or mortgage the same to raise money for payment of funeral or testamentary expenses or debts, or, if necessary, legacies. By such a sale or mortgage the leaseholds are conveyed free from all claims of the deceased person's creditors, legatees or next of kin; and the purchaser or mortgagee is in no way concerned to see to the application of the purchase money, or to inquire for what purpose the sale or mortgage is made (*m*). Leaseholds, if specifically bequeathed, devolve nevertheless upon the executor in the first instance, and do not pass to the specific legatee until the executor has assented to the bequest: but when this assent is given, they vest in the legatee at once, without the necessity of any formal conveyance to him (*n*). And it should be noted that when executors have once assented to a bequest of leaseholds or other chattels—even to a bequest to themselves as trustees of the will—they lose their executorial property therein, and can no longer exercise their joint and several executorial powers to sell or mortgage the same (*o*). Leaseholds are distributable as other chattels upon intestacy according to the Statutes of Distribution (*p*). There

Leaseholds.

Executors' or administrator's power of disposition.

Leaseholds specifically bequeathed.

Executor's assent—

puts an end to executorial powers of disposition.

(*g*) See Wms. Real Prop. 513-515, 23rd ed.
(*h*) Ibid. 515, 516. (*i*) Ibid. 20, 21, 567.
(*k*) *Simpson* v. *Gutteridge,* Madd. 609.
(*l*) *Brazier* v. *Hudson,* 8 Sim. 67.
(*m*) 2 Wms. Exors. 932-943, 946 *sq.*, 7th ed.; *Re Whistler,* 35 Ch. D. 561; *Re Venn and Furze's Contract,* 1894, 2 Ch. 101.
(*n*) *Doe* v. *Guy,* 3 East, 120; Wms. Exors. 679, 1372, 7th ed.; Wms. Real Prop. 235, 236, 567, 23rd ed.; *Re Culverhouse,* 1896, 2 Ch. 251.
(*o*) *Paramour* v. *Yardley,* Plowd. 539, 544, 546; *Barton's case,* 1 Freem. 289; *Attenborough* v. *Solomon,* 1913, A. C. 76. On the main decision in the last case see the writer's criticism in 58 Sol. J. 230 and 31 L. Q. R. 75.
(*p*) Wms. Real Prop. 21, 23rd ed.; Wms. Pers. Prop. 522 *sq.*, 17th ed.

is, however, this difference between leaseholds and other goods:—Personal chattels devolve on death according to the law of the country in which their owner was domiciled, whilst the succession to lands held under a lease for years is determined by the law of the place where they are situate (*q*).

Equitable estates.

The devolution on death of an equitable estate in land corresponded in general with that of the legal estate, which was the subject of the equity. Thus the succession after death to the estate of a *cestui que trust* under a simple trust or of a mortgagor of freeholds, copyholds or leaseholds, was governed by the same rules as determined the course of the legal interest therein (*r*). The exception was that under the old law a widow could claim no dower out of her husband's equitable estate (*s*). This exception was removed by the Dower Act in the case of wives married after the 1st of January, 1834 (*t*): but such dower was placed under the control of the husband equally with dower out of legal estates (*u*).

Dower out of equitable estates.

Estates held on trust or in mortgage.

Formerly, when lands were held upon any trust or by way of mortgage, the legal estate therein devolved upon the tenant's death in the same manner as if he were the beneficial owner of them, but subject to the trust or the equity of redemption. Estates in fee simple so held passed therefore to the devisee or heir, according as they were devised or suffered to descend (*x*). In all well-drawn wills a specific devise used to be inserted of all estates held by the testator upon any trust or by way of mortgage; and this devise was usually made to the persons who were appointed executors (*y*). When a will contained no specific devise of estates subject to a trust or mortgage, the question frequently arose, whether such estates passed under a general devise of all the testator's real estate. The rule was, that such estates did pass under a general devise, unless a con-

(*q*) Wms. Pers. Prop. 480, 481, 522, 17th ed.; *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461; *Duncan* v. *Lawson*, 41 Ch. D. 394; *Pepin* v. *Bruyère*, 1902, 1 Ch. 24.

(*r*) Lewin on Trusts, 670, 6th ed.; 1006, 10th ed.; Wms. Real Prop. 194, 195, 201, 533, 606, 23rd ed.; *Re Hudson*, 1908, 1 Ch. 655.

(*s*) Wms. Real Prop. 351, 23rd ed.

(*t*) Stat. 3 & 4 Will. IV. c. 105, s. 2; Wms. Real Prop. 355, 23rd ed.

(*u*) Above, pp. 197, 198.

(*x*) Wms. Real Prop. 202, 601, 602, 605, 23rd ed.

(*y*) 4 Davidson, Prec. Conv. 9, 58, 4th ed.

trary intention could be collected from the expressions used in the will, or from the objects of the devise (*z*).

The old rule as to the devolution of estates held on trust was first invaded by the Vendor and Purchaser Act, 1874 (*a*), enacting that upon the death of a bare trustee (*b*), any corporeal or incorporeal hereditament, of which he was seised in fee simple, should vest in his legal personal representative. This enactment was repealed, except as to anything duly done thereunder, by the Land Transfer Act, 1875 (*c*), after having been in force from the 7th of August, 1874, until the 31st of December, 1875. The same Act provided (*c*) that, upon the death of a bare trustee *intestate*, any corporeal or incorporeal hereditament, of which he was seised in fee simple, should vest in his legal personal representative.

Vendor and Purchaser Act, 1874, s. 5.

Land Transfer Act, 1875, s. 48.

When real estate held in mortgage passed on the mortgagee's death to his devisee or heir, it was necessary, on any transfer or reconveyance after such death, that his devisee or heir should convey the legal estate in the mortgaged land, and that his legal personal representatives should join in the conveyance to acknowledge the receipt of the money paid and assign or release the mortgage debt (*d*). By the Vendor and Purchaser

Mortgaged estates.

(*z*) *Lord Braybroke* v. *Inskip*, 8 Ves. 417; 1 Jarm. Wills, 693 *sq.*, 4th ed.; 647 *sq.*, 5th ed.

(*a*) Stat. 37 & 38 Vict. c. 78, s. 5.

(*b*) Different opinions have been expressed by eminent judges as to the meaning of the expression "bare trustee." Thus in *Roe* v. *Reade*, 8 T. R. 118, 122, a mere naked trustee was defined by Lord Kenyon, C. J., as one who has no beneficial interest in the trust property. In *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582, 585, Jessel, M. R., expressed the opinion that this meaning ought to be given to the term "bare trustee" in the Land Transfer Act, 1875, s. 48 (see below, next note). And in *Re Blandy Jenkins' Estate*, 1917, 1 Ch. 16 (Peterson, J.), this meaning was given to the term "bare trustee" as used in the Fines and Recoveries Act, 1833. Other judges, however, have expressed the opinion that in the V. & P. Act, 1874, s. 5, and the Land Transfer Act, 1875, s. 48, the term "bare trustee" is not applicable to a trustee under a special trust who has an active duty to perform with regard to the trust property, as in the case of a trustee for sale, but rather denotes a trustee having no other duty than to convey the trust estate at the *cestui que trust's* direction; see *Christie* v. *Ovington* (Hall, V.-C.), 1 Ch. D. 279; *Re Docwra* (Bacon, V.-C.), 29 Ch. D. 693; *Re Cunningham and Frayling* (Stirling, J.), 1891, 2 Ch. 567; Wms. Real Prop. 191, 23rd ed. Bare trustee.

(*c*) Stat. 38 & 39 Vict. c. 87, s. 48, repealed by 44 & 45 Vict. c. 41, s. 30 (2, 3), as to cases of death after the 31st December, 1881.

(*d*) Davidson, Prec. Conv. vol. ii. pt. ii. pp. 793, 796, n., 816, 818, 4th ed.

Vendor and Purchaser Act, 1874, s. 4.

Act, 1874 (*e*), the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee should have been admitted, might, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage were in form an assurance subject to redemption, or an assurance upon trust. But it was held that this enactment did not give the legal personal representative of a mortgagee power to convey the estate upon a transfer of the mortgage (*f*).

Devolution of real estate held in trust or mortgage after 1881.

So the law continued until the end of the year 1881. On the death after that year of any sole trustee or mortgagee of real estate, the succession is regulated by the 30th section of the Conveyancing Act, 1881 (*g*), providing as follows:—"Where an estate or interest of inheritance or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust or by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his legal personal representatives or representative from time to time (*h*), in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were a chattel real vesting in them or him; and for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers." This enactment was held to apply to copyholds as well as freeholds (*i*): but the Copyhold Act,

Copyholds.

(*e*) Stat. 37 & 38 Vict. c. 78, s. 4, passed 7th August, 1874, and repealed by 44 & 45 Vict. c. 41, s. 30 (2, 3), as to cases of death after the 31st December, 1881.

(*f*) *Re Spradbery's Mortgage*, 14 Ch. D. 514.

(*g*) Stat. 44 & 45 Vict. c. 41, s. 30.

(*h*) These appear to be his general, and not his special, executors, or his administrator if he died intestate; *Re Parker's Trusts*, 1894, 1 Ch. 707, 722; cf. below, p. 215.

(*i*) *Re Hughes*, W. N. 1884, p. 53; *Hall* v. *Bromley*, 35 Ch. D. 642.

1887 (*k*), now replaced in this respect by the Copyhold Act, 1894 (*l*), provided that it should not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor upon any trust or by way of mortgage. As is well known, trustees of copyhold lands are usually admitted tenants thereof, but mortgagees are not (*m*). On the death of a mortgagee of copyholds, who has not been admitted tenant on the rolls, it appears that his estate will still devolve on his executors or administrators. On the death of a sole trustee or mortgagee intestate, it appears that any real estate of inheritance vested in him on trust or by way of mortgage still descends to his heir, pending the appointment of an administrator (*n*); but such real estate vests in the administrator on his appointment as from the time of the intestate's death (*o*).

Devolution on intestacy.

Before 1898, freeholds in fee were liable to be applied in payment of the tenant's debts after his death either because, in the case of specialty debts, he had bound his heir to their payment, or because he had by will devised his real estate in trust for or charged with payment of his debts, or under statute 3 & 4 Will. IV. c. 104 making real estate equitable assets for the payment of the deceased owner's debts generally (*p*). Copyholds in fee were liable to their deceased owner's debts either by virtue of an express charge of debts thereon or under the same statute (*q*). Estates tail in freehold or copyhold were not liable to the tenant's debts after his death (excepting certain Crown debts), unless during his lifetime a judgment had affected the lands, or he had been adjudged bankrupt (*r*). Life estates are of course not liable to the tenant's debts after they have determined by his death or otherwise (*s*). Estates *pur autre vie* were subject to the deceased tenant's debts, if devised, either by virtue of an express charge or under the last-mentioned statute; and if not devised, under

Liability of real estate to deceased owner's debts.

Copyholds.

Estates tail.

Life estates.

Estates *pur autre vie.*

(*k*) Stat. 50 & 51 Vict. c. 73, s. 46, passed 16th September, 1887; see *Re Mills' Trusts*, 37 Ch. D. 312; 40 Ch. D. 14.
(*l*) Stat. 57 & 58 Vict. c. 46, s. 88.
(*m*) Wms. Real Prop. 532, 623, 23rd ed.
(*n*) See *Re Pilling's Trusts*, 26 Ch. D. 432, 433; *Re Griggs*, 1914, 2 Ch. 547; below, p. 213, n. (*z*).
(*o*) *Re Pryse*, 1904, P. 301, 305.
(*p*) Wms. Real Prop. 302-305, 23rd ed.
(*q*) Ibid. 516.
(*r*) Ibid. 312, 313, 517.
(*s*) Ibid. 313, 517.

Equitable estates.

Creditors' remedies.

Debts not a charge on the land.

Lands devised on trust to pay or charged with debts.

the Wills Act, replacing with regard to freeholds the Statute of Frauds in this respect (*t*). And equitable estates were subject to the like liability as estates at law (*u*). When the heir was specially bound to pay his ancestor's debt, the creditor had the remedy of suing the debtor's heir or devisee personally in an action of debt or covenant: but in order to have the debtor's lands applied in payment of debts after his death the creditor was obliged to take proceedings in equity for the administration of the debtor's estate, when a sale or mortgage of the lands would be decreed, if necessary, to raise money to pay the debt (*x*). And the same proceedings were necessary to secure the benefit of an express charge of debts on real estate or of the statute of 3 & 4 Will. IV. c. 104 (*y*). Where the heir was specially bound or the lands were made assets by the statute, the debts were not a specific lien on the lands (*z*); so that if the lands were aliened for valuable consideration by the heir or devisee before any creditors' proceedings were instituted, the creditor could not follow the lands in the hands of the alienee (*a*), who was not bound, even if he had notice of the deceased owner's debts, to see to the application of the purchase money (*b*). And where lands were devised on trust for or charged with payment of debts, the devisee was also enabled to dispose of them, before the institution of any creditors' proceedings, discharged from all liability to the testator's debts; as it was considered that the testator, both in the case of a trust to pay debts and of a charge of debts, had made his devisee a trustee for the payment of his debts, and from the nature of such a trust a purchaser from the devisee was exonerated from the duty of seeing to the application of the purchase money (*c*). And a mortgagee from a devisee or heir, before creditors' proceedings, was in the same position as a purchaser (*d*). Where land

(*t*) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 3, 6; Wms. Real Prop. 138, 139, 515, 516, 23rd ed. (*u*) Ibid. 316, 317.
(*x*) Ibid. 306, 307; Wms. Real Assets, 16.
(*y*) Wms. Real Prop. 303, 23rd ed.
(*z*) *Re Moon*, 1907, 2 Ch. 304.
(*a*) *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Beav. 112; *Kinderley* v. *Jervis*, 22 Beav. 1, 22; Sug. V. & P. 655-657; *Price* v. *Price*, 35 Ch. D. 297; *Re Atkinson*, 1908, 2 Ch. 307; *Worthington & Co., Ltd.* v. *Abbott*, 1910, 1 Ch. 588, 591, 599.
(*b*) *Jones* v. *Noyes*, 4 Jur. N. S. 1033.
(*c*) Sug. V. & P. 658, 660; Wms. Real Assets, 50, 51, 62.
(*d*) *Ball* v. *Harris*, 4 My. & Cr. 264; *Eland* v. *Eland*, ib. 420; *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567; *Price* v. *Price*, 35 Ch. D. 297; *Re Atkinson*, 1908, 2 Ch. 307.

was charged by will with debts and also with legacies or annuities, the devisee or the heir (*e*) taking by descent the land so charged could give a good discharge to a purchaser or mortgagee without the concurrence of the legatees or annuitants (*f*): but if the land were charged with legacies or annuities only, the concurrence of the legatees or annuitants was necessary in order to sell or mortgage the land free from their charge (*g*). But after an order had been made for the general administration of the deceased debtor's estate, in creditors' proceedings duly registered as *lis pendens* (*h*), the heir or devisee could not dispose of the lands descended or devised to him free from the creditors' claim (*i*). Whether he could so dispose of such lands after creditors' proceedings had been instituted and duly registered as a *lis pendens*, but before an order for administration had been made therein, depended on the nature of the proceedings. If they sufficiently indicated an intention to enforce payment of the debts out of the lands descended or devised, and the heir or devisee were made a party thereto, a purchaser or mortgagee from him would be bound thereby; unless the circumstances were such that the purchaser or mortgagee was entitled to suppose that the sale or mortgage was made to raise money to pay the debts, as where the lands were devised charged with debts to one who was also appointed executor (*j*). The case of a trust or power to sell for payment of debts would appear to be similar; although after an order for administration, the trustees must exercise their powers under the direction of the Court (*k*). So an executor, in exercise of his general power to alien his testator's assets, may well dispose of the testator's leaseholds, notwithstanding that creditors' proceedings are pending, at any time before an order for administration is made (*l*).

Charge of debts and legacies or annuities.

Charge of legacies or annuities alone.

Effect of order for administration—

of creditors' proceedings registered as *lis pendens*.

(*e*) See *Bailey* v. *Ekins*, 7 Ves. 319, 323; *Shiphard* v. *Lutwidge*, 8 Ves. 26; Williams on Real Assets, 56-64.

(*f*) *Jebb* v. *Abbott*, Co. Litt. 290 b, note (1), sect. xiv. 3; *Johnson* v. *Kennett*, 3 My. & K. 624, 630; *Page* v. *Adam*, 4 Beav. 269; Sug. V. & P. 658; Williams on Real Assets, 62-64; *Re Henson*, 1908, 2 Ch. 356.

(*g*) *Horn* v. *Horn*, 2 S. & S. 448; *Johnson* v. *Kennett*, ubi sup.; *Re Rebbeck*, 63 L. J. Ch. 596; *Re Evans and Bettell's Contract*, 1910, 2 Ch. 438.

(*h*) See Wms. Real Prop. 317, 23rd ed.

(*i*) See *Price* v. *Price*, 35 Ch. D. 297.

(*j*) Ibid.; and see *Corser* v. *Cartwright*, L. R. 7 H. L. 731.

(*k*) Lewin on Trusts, 391, 392, 515, 6th ed.; 515, 733, 734, 10th ed.

(*l*) *Neeves* v. *Burrage*, 14 Q. B. 504.

Executors formerly had no interest in their testator's real estate.

Before 1898, the rule was that an executor took no estate or interest by virtue of his office in any of his testator's real estate; any devise of such real estate was entirely independent of the executor's assent or interference (*m*); and, as we have seen (*n*), a will of real estate, as such, did not require probate. We have noticed (*o*) the exceptions created by statute in the case of estates *pur autre vie* undevised, where there was no special occupant, and of estates held on trust or by way of mortgage. But of course a man might expressly devise his lands to his executors on trust for sale or otherwise, or so that his executors should have a power of disposing of his lands; and such devises were commonly made whenever a testator desired that any of his real estate should be sold or applied in payment of his debts.

Power for executors to sell real estate might be implied, if the proceeds of sale were distributable by them.

And in certain cases a power for a man's executors to sell his real estate would be implied. Thus when by will lands were directed to be sold, without saying by what persons the sale was to be made, it would be implied that the executors should have the power of selling the lands, if the proceeds of sale would be distributable by the executors, as where the sale was directed to be made for the purpose of paying debts or legacies or the testator had created a mixed fund composed of the proceeds of sale of such lands and of personalty (*p*). And about the middle of the last century it was decided in equity (*q*) that a mere testamentary charge of debts on real estate implied a power for the executors to sell the real estate so charged (*r*). This doctrine met with severe criticism from eminent lawyers (*s*); it

Power for executors to sell implied in equity from charge of debts.

(*m*) See 1 Wms. Exors. pt. ii. bk. ii.; Wms. Real Prop. 221, 13th ed.; 276, 23rd ed.

(*n*) Above, p. 147. (*o*) Above, pp. 199, 201, 204.

Where proceeds of sale not distributable by executors.

(*p*) Sug. Pow. 118, 8th ed.; 1 Wms. Exors. 655, 7th ed.; Wms. Real Assets, 53-55, 77 *sq.* If, however, the proceeds of sale were not distributable by the executors, and the testator had not created a mixed fund, as where lands were devised to A. for life and after his death to be sold and the proceeds to be divided between B. and C., the testator's executors had no power to sell, and the sale had to be carried out by the testator's heir, to convey the legal estate which had descended to him in remainder after A.'s life estate, with the concurrence of B. and C. to give receipts for their shares of the purchase money; *Bentham* v. *Wiltshire,* 4 Madd. 44; see *Patton* v. *Randall,* 1 J. & W. 189; *Allum* v. *Fryer,* 3 Q. B. 442, 443; *Forbes* v. *Peacock,* 12 Sim. 528, 536; *Curtis* v. *Fulbrook,* 8 Hare, 25, 278; Sug. Pow. 118-120, 8th ed.; Williams on Real Assets, 53-55.

(*q*) The contrary was decided at law; *Doe* d. *Jones* v. *Hughes,* 6 Ex. 223.

(*r*) *Wrigley* v. *Sykes,* 21 Beav. 337; *Sabin* v. *Heape,* 27 Beav. 553.

(*s*) Sug. Pow. 120-122; Sug. V. & P. 662, n.; Wms. Real Assets, 81 *sq.*; Lewin on Trusts, 402 *sq.*, 6th ed.; 526 *sq.*, 10th ed.

was not only thought to be unwarranted by reason or authority, but it threw doubt on the previously received opinion that a devisee of lands charged with debts could so dispose of the same as to exonerate the purchaser from seeing that the testator's debts were paid (*t*). In 1859, statutory provision was made to remove the difficulties then attendant on the sale of lands charged by will with the payment of debts. Lord St. Leonards' Act (*u*) provides (*x*) that where, by any will that shall come into operation after the passing of the Act, the testator shall have charged his real estate or any specific portion thereof with the payment of his debts or of any legacy, or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, such trustee or trustees may, notwithstanding any trusts actually declared by the testator, raise such debts, legacy or money by sale or mortgage of the lands devised to them. But if any testator, who shall have created such a charge, shall not have devised the hereditaments charged in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in his will (if any) shall have the same power of raising the same moneys as is before vested in the trustees (*y*). And purchasers or mortgagees are not to be bound to inquire whether the powers thus conferred shall have been duly exercised by the persons acting in exercise thereof (*z*). But these provisions are not to prejudice or affect any sale or mortgage made or to be made in pursuance of any will coming into operation before the passing of the Act; nor are they to extend to a devise to any person in fee or in tail or for the testator's whole estate and interest charged with debts or legacies; nor are they to affect the power of any such devisee to sell or

Statutory powers for sale of lands charged with debts or legacies.

Power of devisee in fee or tail of lands charged with debts to sell or mortgage.

(*t*) Above, p. 206.

(*u*) Stat. 22 & 23 Vict. c. 35, passed 13th August, 1859.

(*x*) Sect. 14. The powers thus conferred extend to all persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, and to any persons appointed to succeed to the trusteeship, either under any power in the will, or by the Court; sect. 15.

(*y*) Sect. 16. Such power shall from time to time devolve to the person or persons (if any) in whom the executorship shall for the time being be vested.

(*z*) Sect. 17.

mortgage as he or they may by law now do (*a*). It will be observed that this last enactment does not expressly settle the question whether a devisee of lands charged with debts could dispose of them freed from the charge, according to the old conveyancing opinion (*b*). And in a subsequent case in the House of Lords, where it was held that a devisee of lands charged with debts, who was also an executor, could certainly dispose of the lands freed from the charge, Lord Cairns observed that different considerations might arise where such a devisee was not executor (*c*). Mr. Joshua Williams, however, appears to have had no hesitation in pronouncing for the old conveyancing opinion (*d*) in this case, namely, that the charge of debts enabled the devisee to give a receipt for the purchase-money exonerating the buyer from seeing to its application (*e*). And Mr. Dart approved of this conclusion on principle: although he advised that a prudent purchaser could scarcely disregard Lord Cairns' dictum, and recommended him, in cases not covered by Lord St. Leonards' Act, either to satisfy himself that the debts were paid, or to procure the executors' authority for payment of the purchase-money to the devisee (*f*). It has been held that, when executors sell real estate charged with debts under the power of sale so given by statute, the purchaser is not bound to inquire whether any debts remain unpaid, until twenty years have elapsed after the testator's death (*g*).

Inquiry if any debts still unpaid.

Administrators.

An administrator of an intestate person's effects of course had no interest in his real estate; and an administrator *cum*

(*a*) Sect. 18. See *Re Wilson*, 2 Times L. R. 443; 34 W. R. 512; *Re Barrow-in-Furness Corpn. and Rawlinson's Contract*, 1903, 1 Ch. 339.

(*b*) Above, pp. 206, 207.

(*c*) *Corser* v. *Cartwright*, L. R. 7 H. L. 731, 737. The decision in this case was followed in *Re Henson*, 1908, 2 Ch. 356.

(*d*) Above, p. 206.

(*e*) Wms. Real Prop. 223, 13th ed.; 276, 277, and n. (*i*), 23rd ed.

(*f*) 2 Dart, V. & P. 618-621, 5th ed.; 697-700, 6th ed.; 639-642, 7th ed.

Inquiries on sale of leaseholds by executor.

(*g*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465. This rule is not applicable in the case of an executor selling leaseholds: and the purchaser is entitled, unless he have actual notice that no debts remain unpaid, to presume that such a sale is rightly made although more than twenty years have elapsed since the testator's death; *Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze's Contract*, 1894, 2 Ch. 101; *Re Verrell's Contract*, 1903, 1 Ch. 65. In such case, however, the purchaser should inquire whether the executor has assented to any specific or general devise made by the will of the leaseholds sold; for if he has, he will have lost his executorial power of sale; see above, p. 201.

testamento annexo acquired no interest in any real estate devised to the executors of the will, and could not exercise any power which the testator had either expressly or impliedly (*h*) given to his executors with respect to his real estate (*i*). Nor can an administrator *cum testamento annexo* exercise the powers given to executors by Lord St. Leonards' Act to sell or mortgage the testator's real estate to pay debts or legacies (*k*).

The Land Transfer Act, 1897.

By the Land Transfer Act, 1897 (*l*), where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death after that year (*m*), notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him. This enactment applies to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him (*n*). But the expression "real estate" does not here include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*o*). Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate (*p*).

Real estate vests in the personal representatives.

Real estate appointed by will under general power.

Personal representatives hold as trustees for the heir or devisee.

Subject to the powers, rights, duties and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate (*q*). All enactments and rules of

(*h*) Above, pp. 208, 209.
(*i*) Y. B. 15 Hen. VII. fos. 11, 12, pl. 22, translated Sug. Pow. 893, 895, 8th ed.
(*k*) *Re Clay and Tetley*, 16 Ch. D. 3; above, p. 201.
(*l*) Stat. 60 & 61 Vict. c. 65, s. 1 (1).
(*m*) Sects. 1 (5), 25.
(*n*) Sect. 1 (2).
(*o*) Sect. 1 (4).
(*p*) Sect. 1 (3). Where a person dies possessed of real estate, the Court shall in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir at law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin; sect. 2 (4).
(*q*) Sect. 2 (1).

law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration, and other matters in relation to the administration of personal estate and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him (*r*), save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate (*s*). This proviso has, however, been modified by the Conveyancing Act, 1911 (*t*), enacting that, where probate is granted to one or some of several persons named as executors, power being reserved to the others or other to prove, the sale, transfer or disposition of real estate may, notwithstanding anything contained in sub-section (2) of section two of the Land Transfer Act, 1897, be made by the proving executor or executors without the authority of the Court, and shall be as effectual as if all the persons named as executors had concurred therein. By the Land Transfer Act, 1897, in the administration of the assets of a person dying after the year 1897, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing in the Act contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies (*u*).

Powers of personal representatives over real estate.

The proving executors may now sell or mortgage real estate.

Liability of real estate to deceased owner's debts.

Personal representatives' assent to devise of real estate.

At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any

(*r*) *Sic.* (*s*) Sect. 2 (2).

(*t*) Stat. 1 & 2 Geo. V. c. 37, s. 12 (1). By sect. 12 (2), this section applies to probates granted before as well as after the commencement of this Act, but only as respects dispositions made after the commencement of this Act. By sect. 16 (2), this Act came into operation on the 1st of January, 1912.

(*u*) Stat. 60 & 61 Vict. c. 65, s. 2 (3).

money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance (*x*). And at any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or in the case of registered land, that the person so entitled be registered as proprietor of the land either solely or jointly with the personal representatives (*y*).

The Court may order them to convey to the devisee or heir.

It is not the writer's purpose to make an exhaustive comment on this Act: but its most important results may be indicated. The first of these is to assimilate the devolution of the legal estate in freehold lands held in fee to that of a chattel real (*z*),

Effect of the Act.

(*x*) Sect. 3 (1). (*y*) Sect. 3 (2).

(*z*) There is this distinction, however:—Pending the appointment of an administrator, the chattels of a person dying intestate vested formerly in the ordinary, and afterwards in the judge of the Court of Probate and now appear to vest in the judges of the High Court of Justice who have succeeded to the jurisdiction of the judge of the Probate Court; stats. 21 & 22 Vict. c. 95, s. 19; 36 & 37 Vict. c. 66, ss. 11, 12, 16, 31, 34; *Pinney* v. *Hunt,* 6 Ch. D. 98; *Whitehead* v. *Palmer,* 1908, 1 K. B. 151, 157 (where such chattels are said to vest in the President of the Probate Division: *sed qu.*); Wms. Pers. Prop. 515-518, 17th ed.; but the freehold estates in fee simple of a person dying intestate still vest in the heir pending the appointment of an administrator; *Re Griggs,* 1914, 2 Ch. 547. In *John* v. *John,* 1898, 2 Ch. 573, 576, North, J., held that since the commencement of the Land Transfer Act, 1897, real estate *devised to a man's executors* descends to the heir pending probate of the will. But this appears to have been an oversight. Where executors are appointed, they derive their authority and right to represent the testator from the will, not from the Court in which the will is proved. And the Act provides that real estate shall vest in the legal personal representatives in the same manner as chattels real vest in them, and applies to real estate the law with respect to dealing with chattels real before probate. Chattels real vest in the executors appointed by their owner's will immediately on his death; and the executors can dispose of them before probate; *Graysbrook* v. *Fox,* Plowd. 275, 281; *Hensloe's Case,* 9 Rep. 38a; *Woolley* v. *Clark,* 5 B. & A. 744; *Brazier* v. *Hudson,* 8 Sim. 67. And it has since been decided that the law is now the same with regard to real estate; *Re Pawley and London and Provincial Bank,* 1900, 1 Ch. 58. But were this not so, it does not appear that real estate *devised* would descend to the heir pending probate. When an administrator has been appointed, his title to the real estate relates back to the intestate's death; *Re Pryse,* 1904, P. 301, 305.

Devolution of chattels pending the appointment of administrator—

of freeholds.

and to subject such lands to the same liability to their deceased owner's funeral and testamentary or administration expenses and debts as his chattels incurred at common law, though without interfering with the order in which the assets are applicable in payment of such expenses and debts (*a*). Then the personal representatives are invested with the same powers of disposition over such lands as they have at common law with respect to chattels real (*b*); but with the important distinction that such powers are not exercisable by some or one only of several joint personal representatives without the authority of the Court. And it was decided that, where a testator appoints several executors, his real estate vests in all of them immediately on his death; so that if any one of them did not prove the will and did not renounce probate, the others could not dispose of the real estate without his concurrence (*c*). In this respect, however, the law was amended, as regards dispositions made after the year 1911, by the Conveyancing Act, 1911 (*d*), which now enables the proving executor or executors alone to sell or mortgage the testator's real estate, without the concurrence of the non-proving executor or executors or the authority of the Court. Dispositions made by an executor or executors before the 1st of January, 1912, remain subject to the

Re Pawley and London and Provincial Bank.

The proving executor or executors may now exercise the statutory powers.

(*a*) See *Re Jones*, 1902, 1 Ch. 92; *Re Vickerstaff*, 1906, 1 Ch. 762; *Re Betts*, 1907, 2 Ch. 149; *Re James*, 1911, 2 Ch. 348. The order is as follows:—

Order of application of dead man's assets in payment of his debts.

1. The general personal estate not expressly or impliedly exempted.
2. Lands expressly devised to pay debts, whether the inheritance or a term carved out of it be so limited.
3. Estates which descend to the heir, whether acquired before or after the making of the will; see *Re Pullen*, 1910, 1 Ch. 564.
4. Real or personal property devised or bequeathed, either to the heir or a stranger, charged with debts, and disposed of, subject to such charge; *Re Salt*, 1895, 2 Ch. 203; *Re Roberts*, 1902, 2 Ch. 834; *Re Kempster*, 1906, 1 Ch. 446; *Re Balls*, 1909, 1 Ch. 791, 794.
5. General pecuniary legacies.
6. Specific legacies and real estate devised, whether in terms specific or residuary, *pro ratâ*.
7. Real and personal property over which the testator had a general power of appointment, and which he has appointed, either by his will or by deed, in favour of a volunteer.

Retainer.

See 2 Jarm. Wills, 622, 4th ed.; Wms. Real Prop. 304-307, 23rd ed. The Act does not give to an executor or administrator any right of retainer out of real estate; *Re Williams*, 1904, 1 Ch. 52.

(*b*) See above, pp. 201, 202, 210, n. (*g*).
(*c*) *Re Pawley and London and Provincial Bank*, 1900, 1 Ch. 58.
(*d*) Stat. 1 & 2 Geo. V. c. 37, s. 12; above, p. 212.

previous law; and this Act does not enable one or some of several *proving* executors to sell or mortgage the testator's realty, but all the proving executors must still concur in such disposition. Where, however, the testator appoints general executors and also special executors (as of his assets in a colony or foreign country) his real estate in England vests in his general executors only, who can sell and convey the same without the concurrence of the special executors (*e*). And if one of several executors renounce probate, the proving executors or executor can, independently of the Conveyancing Act, 1911 (*f*), and could before that Act, alone sell or mortgage the testator's real estate; for renunciation of probate by one appointed executor is equivalent to a disclaimer of any interest conferred on him by the appointment in the testator's estate, real or personal (*g*).

Real estate vests in the general (not special) executors.

Renunciation of probate.

The Land Transfer Act, 1897, makes it equally necessary for executors to assent to a devise of land, whether specific or residuary (*h*), as to a specific bequest of personalty. And the executors' assent is sufficient to vest in the devisee the legal estate in the devised lands, without any formal conveyance, as in the case of assent to the specific bequest of a chattel real (*i*). But where lands are not devised but suffered to descend, the legal personal representatives must convey the same to the heir (*k*). Having regard to the provisions of the Act with

Executors' assent to devise of realty.

(*e*) *Re Cohen's Executors and London County Council*, 1902, 1 Ch. 187.

(*f*) Stat. 1 & 2 Geo. V. c. 37, s. 12; above, pp. 212, 214.

(*g*) See *Long* v. *Symes*, 3 Hagg. 771, 774, 776; *Re Birchall*, 40 Ch. D. 436, 439; *Re Fisher and Haslett*, 13 L. R. Ir. 546. As a rule, a trust estate may be disclaimed by deed or by conduct, as well as by matter of record; *Re Birchall*, ubi sup. But an executor cannot renounce probate by matter *in pais*; *Long* v. *Symes*, ubi sup.; Wms. Exors. 281, 7th ed. Since, therefore, an executor, who has not proved, cannot disclaim the office by deed or conduct, it appears that he cannot so disclaim the estate in the testator's realty vested in him as incident to that office. It follows that, before the Conveyancing Act, 1911, an executor who had disclaimed his office and estate by deed, but had not renounced probate, was still a necessary party to any disposition by the proving executor or executors of the testator's realty.

Effect of executor's disclaimer, without renunciation of probate.

(*h*) The law regards every devise of lands as being in effect specific, though in terms it may be residuary; *Hensman* v. *Fryer*, L. R. 3 Ch. 420; *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136; 2 Jarm. Wills, 2027, n. (*j*), 6th ed.

(*i*) *Re Pix*, 1901, W. N. 165; *Kemp* v. *Inland Revenue Commrs.*, 1905, 1 K. B. 581, deciding that no stamp is necessary where the assent is given in writing not under seal; above, p. 201.

(*k*) See sect. 3 (1), above, p. 213.

Must all the proving executors join in assenting?

regard to the powers of several executors to sell or *transfer* real estate and the right of the heir or devisee to require a *transfer* of the same (*l*), and the above-mentioned decision (*m*), the questions are raised whether before the year 1912 all those appointed executors (save such as had renounced probate) must not have joined in assenting to a specific devise (*n*), and whether after the year 1911 all the proving executors must not join in such assent (*o*). It seems clear that formerly all the executors appointed, who had not renounced probate, must have joined in a *conveyance* of the real estate to the devisee or heir, and that since the end of the year 1911 all the proving executors must join in such a conveyance. Conveyancers investigating title must bear in mind that assent to a devise of real estate (*p*), as to a bequest of leaseholds (*q*), may be either express or implied (as by putting the devisee in possession or allowing him to receive the rents and profits of the devised land), or may be presumed from the executors' acts (*r*); and that when such assent has once been given, the executors can no longer exercise their statutory powers of disposition of the devised land (*s*). And it must not be forgotten that the executors' powers to dispose of the dead man's real or leasehold estate are exercisable only for the purpose of raising money to pay his funeral and testamentary expenses and debts, and not for facilitating the distribution of his estate; so that if a proposing purchaser or mortgagee of such estate from the executors has notice that there are no such debts or expenses remaining unpaid, he cannot safely accept the title (*t*). It has, however, been decided in Ireland that an *administrator's* power of sale of leaseholds, which belonged to the intestate, may well be exercised for the

They must all join in a conveyance to the devisee or heir.

Assent may be express or implied—

or presumed—and puts an end to the executors' powers of disposition.

Executorial powers of disposition available only to pay funeral or testamentary expenses and debts.

Sale of leaseholds for division among next of kin.

(*l*) Above, pp. 211—213.

(*m*) Above, p. 215, n. (*g*).

(*n*) In the case of a chattel, real or personal, assent may be either express or implied, and the assent of one of several executors is sufficient, even though he be himself the legatee; *Townson* v. *Tickell*, 3 B. & A. 31, 40; *Cole* v. *Miles*, 10 Hare, 179; 2 Wms. Exors. 948, 1374-1378, 7th ed. In the absence of any decision, it cannot safely be assumed that this is now the law with regard to realty.

(*o*) See above, pp. 212, 214, 215.

(*p*) *Kemp* v. *Inland Revenue Commrs.*, 1905, 1 K. B. 581, 585.

(*q*) 2 Wms. Exors. 1374-1377, 7th ed.; *Stevenson* v. *Mayor of Liverpool*, L. R. 10 Q. B. 81; *Thorne* v. *Thorne*, 1893, 3 Ch. 196, 202.

(*r*) See *Wilson* v. *Rhodes*, 8 Ch. D. 777; *Attenborough* v. *Solomon*, 1913, A. C. 76.

(*s*) Above, pp. 201, 210, n. (*g*); *Re Milner and Organ's Contract*, 64 Sol. J. 463, 464.

(*t*) See *Re Verrell's Contract*, 1903, 1 Ch. 65, and next note.

purpose of dividing the estate among several next of kin (*u*). And it appears that the rule laid down with regard to leaseholds (*v*) now applies to real estate as well (*x*); namely, that an intending purchaser or mortgagee from personal representatives is not bound to inquire whether such debts or expenses remain unpaid, even though twenty years or more have elapsed since the testator's or intestate's death. And it is thought that he should not make any such inquiry; for an answer that no debts or expenses remain unpaid, will of course give him notice of that fact (*y*). But he *should* ask if the executors, in the case of a will, have assented to any specific or residuary devise therein contained; for he must ascertain this at his peril (*z*). And he should be careful to note if any of the circumstances, of which he is informed, amount to notice that there are no debts or funeral or testamentary or administration expenses remaining unpaid (*a*). Where the personal representatives convey the real estate to the heir or devisee, subject to a charge for the payment of any money which they are liable to pay (*b*), and have previously issued the usual statutory advertisements for creditors, the charge does not extend to debts of which they had no notice at the time of the conveyance (*c*). And where lands are devised to one for life with remainder over, assent to the devise to the tenant for life is assent to the devise in remainder (*d*).

Purchaser or mortgagee need not inquire if any such expenses or debts remain unpaid—

but should ask if executors have assented to any devise—

and beware of notice of no debts or expenses remaining unpaid.

Conveyance to heir or devisee subject to charge.

Assent to devise of land in settlement.

(*u*) *Re Norwood and Blake's Contract,* 1917, 1 I. R. 472. It is a question whether this decision would be followed in England. It has been held here that, after all the funeral and administration expenses have been paid, the administrator of an intestate is a trustee for the statutory next of kin, as tenants in common if more than one, and (as it appears) of the intestate's effects *in specie;* see *Vanneck* v. *Benham,* 1917, 1 Ch. 61, 76, and cases there cited; *Re Ponder,* 1921, 2 Ch. 59; and see below, p. 223. It is thought that the above Irish decision does not enlarge the powers of *executors,* whose duty it is, when all the debts and expenses have been discharged, to assent to the bequests or devises in the will, and who on such assent part immediately both with their executorial estate and their executorial powers; see pp. 201, 206.

(*v*) Above, p. 210, n. (*g*).

(*x*) See above, p. 211.

(*y*) See above, p. 216, n. (*t*).

(*z*) See *Attenborough* v. *Solomon,* 1913, A. C. 76; above, pp. 201, 210, n. (*g*).

(*a*) See p. 216, n. (*t*).

(*b*) See above, p. 213.

(*c*) *Re Cary and Lott's Contract,* 1901, 2 Ch. 463. See Wms. Pers. Prop. 499, 17th ed.

(*d*) *Lampet's Case,* 10 Rep. 46 b; *Adams* v. *Pierce,* 3 P. W. 12; *Stevenson* v. *Mayor of Liverpool,* L. R. 10 Q. B. 81.

Sale or mortgage by administrator valid, though will afterwards found and proved.

If letters of administration have been granted to the effects of a man who was erroneously presumed to have died intestate, a sale made by the administrator under his statutory powers of the dead man's real estate is valid, notwithstanding that a will be afterwards found and the letters of administration recalled and probate of the will granted; and the executors or other persons claiming under the will cannot recover the land sold from the purchaser (*e*). A sale by an administrator in similar circumstances of the dead man's leaseholds or other chattels is equally valid (*f*). And the same rule of course applies to a mortgage in the like case by the administrator of real estate, leaseholds or other chattels under the power of disposition incident to his office.

Devolution of beneficial interest in real estate.

The devolution of the beneficial interest in real estate is not expressly altered by the Land Transfer Act. Such interest may therefore be devised to the same extent as before, remains subject to the law of dower and curtesy, and upon intestacy descends to the heir or escheats according to the law previously in force (*g*). We have seen that the opinion has been judicially expressed that the interest of a widow entitled to dower out of a dead man's land is paramount to the claims of his creditors, who have obtained no charge thereon in his lifetime, to be paid out of such real assets after his death (*h*). And it was considered in the Irish case above mentioned that the widow so entitled would be a necessary party to any sale or mortgage of the dead man's real estate by his personal representatives under their statutory powers to raise money to pay his debts (*i*). Intending purchasers or mortgagees of a dead man's real estate from his personal representatives must therefore be careful to ascertain that his widow is not entitled to dower thereout, or if she is, to require that her concurrence shall be obtained.

Dower considered paramount to claims of deceased's unsecured creditors.

Construction placed since Land Transfer Act on devises for legal contingent remainders.

Although the Land Transfer Act does not purport to make any change in the succession after death to the beneficial interest in real estate, the construction placed on that Act in the case of *Re Robson* (*k*) *does* effect such a change where a testator has devised his land in settlement by way of legal contingent

(*e*) *Hewson* v. *Shelley*, 1914, 2 Ch. 13.
(*f*) See *S. C.*, 1914, 2 Ch. 28, 29, 36, 46.
(*g*) Above, pp. 196—199.
(*h*) Above, p. 197, n. (*f*).
(*i*) *Re McMackin*, 1909, 1 I. R. 374, 381; see above, p. 197, n. (*f*).
(*k*) 1916, 1 Ch. 116.

remainder. In *Re Robson* (*k*) a testator, who died in 1905, had devised land directly to the use of his daughter for her life and after her death to the use of such of her children in fee simple as should attain the age of twenty-one years as tenants in common; and the executors had assented to the devise. The daughter died in 1915, leaving four children, of whom two were of age and two were infants. And it was held by Astbury, J., that, owing to the provisions of the Land Transfer Act, 1897, whereby the land vested first in the testator's executors, who were to hold as trustees for his devisees (*l*), the interests devised to the daughter's children became contingent remainders of equitable estates, and that they retained this quality, notwithstanding the executors' assent to the devise. And he decided that, in consequence of this, the contingent remainders to the two younger children, who were infants at the daughter's death, did not fail for not vesting at the determination of the particular estate, but remained capable of taking effect. At common law, the land would have vested, on the daughter's death, in the two children who had then attained twenty-one, and the two infant children would have been excluded (*m*). This decision raises the question, whether devises of contingent remainders, which would have been valid of legal estates but void of equitable estates, such as a devise to A., a bachelor, for life, with remainder to his first son who shall attain the age of twenty- *Re Robson.*

(*k*) See note (*k*), opposite.

(*l*) Stat. 60 & 61 Vict. c. 65, ss. 1 (1), 2 (1); above, pp. 211, 212.

(*m*) See 1916, 1 Ch. 117, 118, 121, 122. A question was raised, which the judge declined to decide, whether the infant children's interests were preserved by the Contingent Remainders Act, 1877 (stat. 40 & 41 Vict. c. 33); see Williams on Seisin, 205, 206; Jarm. Wills, 328, 1445 and n. (*n*), 6th ed. Contingent remainders of equitable estates do not fail merely because they are not ready to vest on the determination of the particular estate; see Wms. Real Prop. 406, 407, 452, 453, 23rd ed. This rule has been applied not only to contingent remainders which are equitable by the settlor's own act (as where he vests the legal estate in trustees), but also where they are equitable by reason of some extraneous act (as a mortgage made by the settlor or his predecessor in title); *Astley* v. *Micklethwait*, 17 Ch. D. 59, 65. And it was held in *Re Freme*, 1891, 3 Ch. 167, that a devise of a contingent remainder to a class, which was of an equitable estate at the testator's death owing to his land being in mortgage, did not lose its quality of an equitable contingent remainder and its immunity from destruction on the determination of the particular estate, because the mortgage was paid off before the particular estate came to an end. Astbury, J., relied on this decision in *Re Robson* for his determination that the infants' contingent remainders continued to be equitable after the executors had assented to the devise; see 1916, 1 Ch. 122-124.

four (*n*), are now made void *ab initio* by the effect of the Land Transfer Act (*o*).

It is obvious that the term *real estate* (*p*) as used in the Land Transfer Act, 1897, must receive a restricted interpretation. Life estates are real estate: but as they cease on death, of course they do not pass to the personal representatives, nor are they made liable to the deceased owners' debts. It is submitted that the key to the construction of the Act is in the provision that real estate shall vest in the personal representatives, *notwithstanding any testamentary disposition* (*q*). This seems to show that the Act is intended to apply to such real estate as may be effectually devised by will. If this be so, the descent of estates tail, whether legal or equitable, remains unaffected by the Act. But pending the decision of the Court on this point, a real difficulty is raised by the unskilled wording of the Act in the case of estates tail. They are not only real estate, but real estate of inheritance in the hands of the donee; as such, they are subject to the law of dower and curtesy (*r*); and they are charged by statute, in the hands of the heir in tail after his ancestor's death, with debts due from the ancestor to the Crown by judgment, recognizance, obligation or other specialty, although the heir shall not have been comprised therein (*s*), and also with all arrears and debts, if any, due to the Crown from the ancestor as an accountant to the Crown whose yearly or total receipts exceeded three hundred pounds (*t*). Why then, it may be urged, shall not estates tail vest in the deceased

Estates tail.

(*n*) See Wms. Real Prop. 393 and n. (*w*), 451-453 and n. (*r*), 23rd ed.; *Abbiss* v. *Burney*, 17 Ch. D. 211.

(*o*) *Re Freme* and *Re Robson*, ubi sup., were both decisions in favour of infants, who would have suffered a hardship in being excluded: but if the rule in *Re Robson* is to be applied to the solution of the above question, the devisee, whose interest would be made void, would suffer equal hardship. It is respectfully submitted that the intention of the Land Transfer Act, 1897, was merely to vest a dead man's real estate in his personal representatives temporarily in order to facilitate the more convenient payment of his debts, and was not to interfere with the succession after his death to the beneficial interest in his lands or to alter the effect of any devise thereof which he had made.

(*p*) As to the origin and meaning of the term "real estate," see Wms. Real Prop. 8, 25-29, 194, 601, 23rd ed.

(*q*) Sect. 1 (1); above, p. 211.

(*r*) Above, pp. 197, 198.

(*s*) Stat. 33 Hen. VIII. c. 39, s. 52 (s. 75 in Ruffhead); Chitty on the Prerogative of the Crown, 299.

(*t*) Stat. 13 Eliz. c. 4; see 25 Geo. III. c. 35; Chitty, Prerogative, 294, 295.

owner's personal representatives and be charged with the payment of all his debts, according to the letter of the Land Transfer Act? It is probable, however, that the Court will consider that no sufficient intention is expressed in the Act to subject estates tail to all their deceased owner's debts, and that the Act only applies to devisable real estate. But the point is one on which it would be scarcely safe to act upon a text-writer's opinion. The Act seems to apply to all real estate, to which the deceased person was entitled for his own benefit in equity, and which he might devise by his will (*u*). As regards copyholds, it is clear that legal estates of inheritance in copyholds vested in one, who has been duly admitted tenant on the rolls for his own benefit, are left to pass to the devisee or heir according to the previous law (*x*). But it has been decided that an equitable estate in fee in copyholds passes to the legal personal representatives under the Act (*y*); and the opinion has been judicially expressed that the provisions of the Land Transfer Act, 1897, excepting copyholds and customary freeholds from being included in "real estate" in cases where an admission or any act by the landlord is necessary to perfect the title of a purchaser from *the customary tenant* (*z*), are to be construed as referring to a purchaser from the copyholder or other customary tenant, who is the actual tenant on the rolls or at law of the lord. Upon this construction of the Act, it appears that the equitable estate in fee of an unadmitted surrenderee of copyholds (*a*) passes on his death to his personal representatives.

Equitable estates.

Copyholds.

Equitable estate in copyholds.

Equitable estate of unadmitted surrenderee.

It has been held that the Crown is not bound by the Land Transfer Act, 1897, and therefore the legal estate in lands escheating to the Crown does not vest in the solicitor to the Treasury, who takes out administration as nominee of the Crown, where chattels fall to the Crown upon intestacy (*b*). But it does not appear that this decision governs the case of an escheat to a common person. Lands liable to escheat are devisable (*c*),

Real estate escheating to the Crown.

(*u*) Kekewich, J., *Re Somerville and Turner's Contract,* 1903, 2 Ch. 583, 587, 588.
(*x*) Above, pp. 200, 201.
(*y*) *Re Somerville and Turner's Contract,* 1903, 2 Ch. 583.
(*z*) Above, p. 211.
(*a*) See 1 Scriv. Cop. 172, 173, 262, 361, 3rd ed.; 1 Wat. Cop. 118 and n. (1), 4th ed.; Elton on Copyholds, 70.
(*b*) *In the Goods of Hartley,* 1899, P. 40.
(*c*) See Wms. Real Prop. 56, 23rd ed.

and are also assets for payment of the deceased tenant's debts (*d*). These are reasons for holding that lands liable to escheat to a mesne lord will vest under the above-mentioned Act in the executors of any will the tenant may have made, though relating to personal estate only, or in his administrator, if he die wholly intestate. It seems that a purchaser of real estate from an executor or administrator professing to sell under this Act should require to be satisfied that the property sold does not escheat to the Crown, *i.e.*, that there is an heir or a devisee.

Personal representatives' powers over real estate are not paramount to Crown's charge for estate duty on the death—

The powers of sale or mortgage given by the Land Transfer Act, 1897, to a dead man's personal representatives do not enable them to dispose of his real estate freed from the charge created thereon by the Finance Act, 1894 (*e*), in favour of the Crown, for the estate duty payable in respect thereof on his death; so a purchaser or mortgagee from them should require this duty to be entirely discharged before completion (*f*). But the personal representatives, being accountable as trustees for this duty, can exercise the power of sale or mortgage given by that Act (*g*) to raise the money required to pay the duty (*f*); and if this power be exercised it does not appear necessary to require that the entire duty shall be discharged, but the purchaser or mortgagee ought to see that the money raised is duly applied for the purposes for which the power was given (*h*). It is thought that the personal representatives can dispose of the dead man's real estate under their statutory powers free from any charge for estate duty payable on the death of any devisee under his will or any person entitled on his intestacy; for these powers of disposition are only exercisable for purposes which are paramount to the interests of his devisees or heir (*i*), and so far as the real estate is actually sold or mortgaged to satisfy these purposes, the devisees or heir take nothing therein; consequently there is no property passing to them on the death.

but are paramount to any charge for estate duty on the death of the devisee or heir—

(*d*) *Evans* v. *Brown*, 5 Beav. 114; *Hughes* v. *Wells*, 9 Hare, 749; *Beale* v. *Symonds*, 16 Beav. 406.
(*e*) Stat. 57 & 58 Vict. c. 30, s. 9 (1).
(*f*) See below, Chap. XXI.
(*g*) Sect. 9 (5).
(*h*) See Hanson's Death Duties, 193, 6th ed. A vendor selling under this power should stipulate that the purchaser shall not require any evidence as to the amount of money required to be raised under the power, or of the discharge of the estate duty on the land sold, or of the application of the purchase-money in or towards such discharge or for any of the purposes of the power.
(*i*) See above, p. 216.

and to any charge for succession duty on the testator's or intestate's death.

For the like reason, a dead man's personal representatives can sell or mortgage his leaseholds and real estate to pay his funeral or testamentary expenses or debts, free from any charge of succession duty owing to any disposition made by his will or the devolution thereof on his intestacy. For succession duty is only made payable by virtue of the disposition or devolution of some beneficial interest in property, and is only charged on the successor's interest therein (*k*); and so far as a man's property is applied after his death in payment of such expenses or of his debts, no such disposition or devolution takes effect, and no beneficial interest is acquired by any successor.

Succession duty on sale of leaseholds for division amongst next of kin.

If the English Courts should follow the Irish decision that an administrator's power of sale is available for the division of an intestate's leaseholds among several next of kin (*l*), the above reasons would not apply in the case of a sale made for that purpose. It is thought, however, that a purchaser of leaseholds from an administrator is still justified in making no inquiry whether any debts or administration expenses remain unpaid (*m*), and that if he complete without having had notice that none remain unpaid, the property would not be charged in his hands with the succession duty payable on the intestate's death. But if he should receive such notice before completion, he could not safely accept the title without the decision of an English Court establishing the administrator's right to sell for the purpose of division (*l*). And even if the administrator's power of sale for this purpose should be so confirmed, it could not safely be assumed, without a further decision on the point, that such an exercise of the power of sale would shift the charge of the succession duty from the property sold to the purchase money (*n*). These questions could only arise with respect to an intestate's real estate in the case of a sale made by the administrator for division among several heiresses inheriting as co-parceners. It certainly cannot be assumed, without a decision of the Court, that an administrator can sell for this purpose. Under the Land Transfer Act, 1897 (*o*), he would be an express trustee for them, and his duty appears to be to convey to them.

Question of sale of real estate for division amongst co-heiresses.

(*k*) See stat. 16 & 17 Vict. c. 51, ss. 2, 42; below, Chap. XXI.
(*l*) Above, pp. 216, 217, n. (*u*).
(*m*) Above, pp. 201, 210, n. (*q*), 217.
(*n*) See below, Chap. XXI. § 2.
(*o*) Stat. 60 & 61 Vict. c. 65, ss. 2 (1), 3 (2), above, pp. 211, 213.

CHAPTER VIII.

OF NOTICE OF TRUSTS AND SALES BY TRUSTEES.

§ 1. Of Notice of Trusts.
§ 2. Of Sales by Trustees.

In order to call attention to every point which may possibly come before a conveyancer for his consideration in advising on title, it would be necessary to give an exhaustive account of the whole of the English law of real property and chattels real. To this the present work makes no pretension, the writer's chief aim being to set forth the main principles of the law relating to sales of land. There are, however, various points arising on particular titles which are of sufficiently frequent occurrence to call for special mention; and it is now proposed to deal with these. We will begin in the present chapter with the subject of notice of trusts and sales by trustees. Next, we will treat of titles depending on the exercise of a power, especially the power of sale given by the Settled Land Acts; and then we will shortly consider a variety of miscellaneous matters such as sales of copyholds, of leaseholds, of lands situate in Middlesex or Yorkshire, and other special subjects.

§ 1.—*Of Notice of Trusts.*

Notice of trust.

We have seen (*a*), that whenever the purchaser's adviser obtains notice from any document or fact appearing on the abstract, or produced or elicited in the course of investigation of the title, that a person entitled to some legal estate or interest in the property sold holds the same upon some trust (*b*) or

(*a*) Above, p. 158.

(*b*) Note that notice that the legal owner holds in trust is sufficient to put the purchaser upon inquiry, although the name of the *cestui que trust* or the purposes of the trust be not disclosed by the notice; *Bank of Montreal* v. *Sweeny*, 12 App. Cas. 617, 621, 622; *Perham* v.

subject to some equity, he must see that title is properly deduced through or from all persons beneficially entitled under the trust or equity, unless the circumstances be such that a good title can be made without the concurrence of the beneficiaries, as in the case of a trust for or power of sale.

Recitals framed to avoid notice of trusts.

When lands are vested in trustees, it is frequently desired to keep notice of the trusts off the title. This is especially the case when mortgages are made to trustees; and it has been the regular practice, whenever a mortgage is held by trustees, to represent in the mortgage deed that they are jointly entitled in equity as well as at law (*c*); and also, when such a mortgage has had to be transferred to give effect to an appointment of new trustees, to frame recitals in the deed of transfer which shall not disclose the trust (*d*). Thus, if John and Thomas are trustees who have invested part of their trust money on mortgage, and Thomas wishes to retire from the trust, Charles being appointed in his place, Charles is duly appointed a trustee in the usual way, and then a separate deed is executed between the three whereby, after a recital that the principal money and interest now owing upon the security have become and are the property in equity of John and Charles, John and Thomas assign the mortgage debt and convey the mortgaged lands to John and Charles (*e*). It has been held that, when recitals

Kempster, 1907, 1 Ch. 373, 380; see also *Re Pope's Contract,* 1911, 2 Ch. 442, 443, 446, where the vendor's predecessors in title had conveyed to the vendor "as trustees": but cf. *Re Soden and Alexander's Contract,* 1918, 2 Ch. 258, 265—267.

(*c*) This was done, before 1882, by the joint-account clause then usual, and has since been usually accomplished by the operation of sect. 61 of the Conveyancing Act, 1881; Wms. Real Prop. 626, 23rd ed.

(*d*) The above passage (from the 2nd ed., p. 238) was cited with approval by Younger, J., and Cozens-Hardy, M. R., in *Re Chafer and Randall's Contract,* 1916, 2 Ch. 8, 12, 19.

(*e*) See Davidson, Prec. Conv. vol. ii. pt. ii. pp. 51-53, 805, 806, 4th ed.; 2 Key & Elph. Prec. Conv. 242, 243, 4th ed.; 262, 263, 10th ed. Where a deed of this kind is abstracted as part of a vendor's title, the purchaser's advisers must of course see that it is duly stamped. Such a transfer, if made between beneficiaries, requires an *ad valorem* stamp. But as a transfer made for effectuating the appointment of a new trustee it would not require a higher stamp than 10*s.*; see stat. 54 & 55 Vict. c. 39, s. 62, and First Schedule, tit. Mortgage; 10 Edw. VII. c. 8, s. 74 (6); Davidson, Prec. Con. vol. iv. pp. 609, 610, 3rd ed. If the mortgage money should exceed 2,000*l.* and the stamp be 10*s.* only, the vendor should be required to have the deed duly stamped with the proper *ad valorem* stamp, or to procure the stamp to be adjudicated. If in such case the deed be stamped with an *adjudication* stamp of 10*s.* the purchaser cannot require it to be further stamped;

Stamp on transfer of mortgage to new trustees.

of this kind are met with, they may and indeed shall be accepted by a purchaser without inquiry (*f*). Conveyancers, therefore, though of course they are well aware for what purpose such statements are made, do not seek to go behind them, and they abstain from inquiries which, if answered, would oust their client from the position of a purchaser for value obtaining the legal estate in good faith without notice of any trust.

Recitals of title in equity.

The acceptance of such statements seems to rest on the presumption that all things have been rightly done (*g*). Thus, if A. and B., who have been parties to deeds which have conferred on them an absolute title at law to some land or mortgage money, choose to acknowledge that the land or money belongs

see stat. 54 & 55 Vict. c. 39, s. 12 (5, 6 a). The better opinion seems to be that the mere fact that such a deed bears an adjudication stamp of 10*s.* is not of itself notice that the transfer was made for effectuating the appointment of a new trustee, or of any trust; see the late Mr. John Dixon's opinion in 49 Sol. J. 317; *Re Soden and Alexander's Contract,* 1918, 2 Ch. 258, 268. By the Conveyancing Act, 1911 (stat. 1 & 2 Geo. V. c. 37), s. 13, it is enacted that, where on the transfer of a mortgage, the stamp duty, if payable according to the amount of the debt transferred, would exceed the sum of ten shillings, a purchaser shall not, by reason only of the transfer bearing a 10*s.* stamp, whether adjudicated or not, be deemed to have or to have had notice of any trust, or that the transfer was made for effectuating the appointment of a new trustee; and this section applies to transfers made before as well as after the commencement of the Act (1st Jan., 1912). This enactment does not, however, provide that in such case the transfer shall be deemed to be duly stamped. It is therefore still necessary for a purchaser, to whom such a transfer of a mortgage for a sum exceeding 2,000*l.*, stamped with a 10*s.* stamp and *not adjudicated,* is offered as part of the title, to require the vendor either to procure the deed to be stamped with the proper *ad valorem* stamp or to procure the stamp to be adjudicated. For if the transfer were *not* made for effectuating the appointment of a new trustee, the *ad valorem* stamp duty would be payable. It is thought that the vendor is bound to comply with this requisition. If the purchaser omit this precaution, he may himself be met with a similar requisition on subsequently selling or mortgaging the property, and he will not then be in possession of the information necessary to assure the Inland Revenue Commissioners that the transfer *was* made to effectuate the appointment of a new trustee, and so may be obliged to pay the *ad valorem* duty and the penalty; see 61 Sol. J. 110, 129; Alpe on Stamp Duties, 31, 32, 13th ed.

(*f*) *Re Harman and Uxbridge, &c. Rail. Co.*, 24 Ch. D. 720, a very strong instance, as the recital which the Court compelled the purchaser to accept was not made by one who otherwise appeared to be absolutely entitled, but was a recital by an executrix, to whom her testator's estate had been given on trust for others, that *her testator* held the property in question as trustee for other persons, who were jointly entitled thereto; *Re Chafer and Randall's Contract,* 1916, 2 Ch. 8, 13, 19, 21, 24; *Re Soden and Alexander's Contract,* 1918, 2 Ch. 258, 263, 264.

(*g*) Ante, p. 108; *Re Cousins,* 31 Ch. D. 671, 675.

in equity to C. absolutely, a purchaser from them is justified in accepting this acknowledgment as rightly made, and in assuming, without further evidence, that the whole beneficial title is, as stated, in C. And he is not bound to make and should refrain from making any further inquiry in the matter, such as whether the trust admitted by A. and B. in C.'s favour is declared by any document. He is, it is conceived, justified in such circumstances in accepting a conveyance of the land or a transfer of the mortgage from A. and B., with the concurrence of C., without making any further investigation of C.'s title or as to the nature of the alleged trust. Where the legal title is correct on the face of the abstract, the purchaser is not entitled to object to it on the *mere suspicion* of some equity adverse to the title (*h*). Upon these principles it has been held that a purchaser must accept as correct a recital in the conveyance on a partition to the vendor that A. (the survivor of two joint tenants formerly seised of the land sold) was seised of the land conveyed as trustee partly for himself and partly for B. (the vendor), and that the purchaser is not entitled to inquire or to require evidence how such trust was created (*i*). And the like decision has been given as to a recital in a conveyance by A., B., and C., seised of land as joint tenants in fee, to B., C., and D. in fee simple, that the land was the property of B., C., and D. as joint tenants in equity as well as at law; and as to a recital in a subsequent release by B. to C. and D. in fee simple, that the land was the property of C. and D. as joint tenants in equity as well as at law (*k*).

Re Chafer and Randall's Contract.

Re Soden and Alexander's Contract.

It is, of course, quite a different matter if some document be disclosed to the purchaser, showing that A. and B. are trustees of land or money on certain particular trusts, as for C. for his life and after his death for his children. In that case the purchaser has notice of the trusts declared by the document,

Where a *document* declaring a trust is disclosed.

(*h*) *McQueen* v. *Farquhar*, 11 Ves. 467; *Green* v. *Pulsford*, 2 Beav. 70; below, Chap. XIX. § 3. The above passage in the text (from "The acceptance of such statements") was cited with approval by Younger, J. and Cozens-Hardy, M. R., in *Re Chafer and Randall's Contract*, 1916, 2 Ch. 8, 12, 19. See also *Pearce* v. *Bulteel*, 1916, 2 Ch. 544, 553, 554, as to the acceptance by a purchaser of a statement, in a conveyance to A. by trustees to pay debts and subject thereto for A., that the debts had been paid; *Re Soden and Alexander's Contract*, 1918, 2 Ch. 258, 263, 264.

(*i*) *Re Chafer and Randall's Contract*, 1916, 2 Ch. 8.

(*k*) *Re Soden and Alexander's Contract*, 1918, 2 Ch. 258.

and must have regard to them; he is no longer entitled or bound to accept as correct any statement by A. and B. that they are jointly entitled in equity as well as at law or are trustees for C. On the contrary, the purchaser is entitled to require and should ask for all such information respecting matters connected with the trusts so disclosed as he could have demanded if no such statement had been made (*l*). For example, where a mortgage has been made to several persons jointly, and it is disclosed to a purchaser that they hold upon the trusts declared by a particular deed of settlement, it should be ascertained that these persons are or were the duly appointed trustees of the settlement and were empowered to invest their trust funds on mortgage and can give receipts for the mortgage money when repaid (*m*). And where land has been conveyed to several persons jointly in fee, and it is disclosed that they are trustees of some settlement, a purchaser from them must find out whether they are duly appointed trustees and were empowered to invest their trust funds in the purchase of land and are empowered to sell the land and can give good receipts for the purchase-money (*n*); and if it appear that such powers have not been conferred upon them, he must require the concurrence of all persons beneficially entitled, and should not accept the title if this cannot be obtained or if some beneficiary be under an insurmountable disability.

Circumstances may make disclosure of a trust unavoidable.

Where lands have been assured to several persons as joint tenants without disclosing the fact that they are trustees, circumstances may occur which will place the conveyancer engaged in investigating the title on behalf of a purchaser in an awkward dilemma. Thus, if it appear on the face of the abstract that several persons were seised of lands in fee (not by way of mortgage), and one of them has died, the purchaser may of course require the usual proof of the discharge of the succession and estate duty which would be payable on the death if they were beneficially entitled (*o*). But if this be done, and the joint tenants were in fact trustees, the only answer that can be given will be that no duty became payable, because the deceased person

Succession and estate duty on death of one of several persons jointly entitled, apparently for their own benefit--

(*l*) *Re Blaiberg and Abrahams*, 1899, 2 Ch. 340; *Re Chafer and Randall's Contract*, 1916, 2 Ch. 8, 19, 21.

(*m*) See *Re Blaiberg and Abrahams, ubi sup.*

(*n*) See *Re Pope's Contract*, 1911, 2 Ch. 442, 443, 446.

(*o*) See stats. 16 & 17 Vict. c. 51, s. 3; 57 & 58 Vict. c. 30, ss. 1, 2 (1).

was not beneficially entitled (*p*). This, however, is tantamount to notice that he was a trustee; and after such an answer the purchaser cannot safely accept the title without the concurrence of the persons beneficially interested (*q*). On the other hand, if no requisition as to succession or estate duty should be made, and the joint tenants should happen not to be trustees, and the duty had not been satisfied, the purchaser would take the property subject to the charge of duty (*r*). And the same difficulty may arise, as regards estate duty, in consequence of the death of one of several joint mortgagees: although with respect to succession duty the law is different. Thus, in such a case succession duty would be payable, if the mortgagees were beneficially entitled, by the survivors as on a succession to personal property; but the duty would not be a charge on the successors' interest, except while the property should remain in their ownership or control; and it does not appear that persons in whom the property (that is, the mortgage debt and the charge on the mortgaged lands) might become vested by alienation *after* the succession had become an interest in possession would be accountable for the duty (*s*). It appears, therefore, to be unnecessary for any person proposing to take from the survivors a transfer or release of the mortgage to inquire respecting the payment of such succession duty (*t*). But in the case of the estate duty which would be payable if the mortgagees were beneficially entitled, it is at least a question whether persons in whom the mortgage should become vested by the alienation of the surviving mortgagees would not be accountable for the duty, and whether the property (which would not have passed to the deceased person's executor) would not be charged therewith (*u*). And if a person taking a transfer from such surviving mortgagees would be so accountable, or the duty be a charge on the

on death of one of several joint mortgagees.

(*p*) See stats. 16 & 17 Vict. c. 51, s. 2; 57 & 58 Vict. c. 30, s. 2 (3).
(*q*) See 2 Dart, V. & P. 594, 5th ed.; 669, 6th ed.; 1230, 7th ed.; above, p. 224, n. (*b*).
(*r*) See stats. 16 & 17 Vict. c. 51, s. 42; 57 & 58 Vict. c. 30, s. 9 (1).
(*s*) See stat. 16 & 17 Vict. c. 51, ss. 42, 44.
(*t*) Davidson, Prec. Conv. vol. ii. pt. ii. pp. 52, 53, 4th ed.; but see 2 Dart, V. & P. 594, 5th ed.; 669, 6th ed.; 1230, 7th ed.
(*u*) See stat. 57 & 58 Vict. c. 30, ss. 8 (4), 9 (1). It may be doubted whether sect. 8 (4), according to the strict grammatical construction of the words used, makes a person accountable in whom the property *shall become* vested by alienation made after the death, which gives rise to the liability to duty; but in Hanson's Death Duties, 179, 6th ed., it is asserted that it does.

mortgage debt, it seems that he ought to ascertain whether the duty has been discharged before he pays them the money owing on the security; and it is easy to put a case in which omission to make this inquiry might lead to a serious liability. Thus, suppose that a father and a son were joint mortgagees, who had made the investment with the view of the survivor becoming solely entitled, and the father died first: could any person safely take a transfer of the mortgage from the son without inquiring as to the payment of the estate duty? For if in this case the duty be indeed a charge on the property which passed on the father's death, then the mortgage debt and the mortgagee's estate in the mortgaged lands would appear to be as effectually charged therewith as if the two mortgagees had made a sub-mortgage of which the debtor had notice. And a similar difficulty arises where it is proposed to take a release or reconveyance by the survivor of two joint mortgagees appearing to be beneficially entitled. For if the estate duty which became payable on the death of one of the mortgagees be a charge on the *property* (that is, the mortgage debt and the mortgagees' estate in the lands), and the mortgagor or his successors in title have notice of the charge of duty, it does not appear that a release or reconveyance to him or them by the surviving mortgagee alone would vest in them the mortgagee's interest free from the charge of duty (if unpaid); and it seems that he or they might be held to be accountable for the duty as being a person or persons in whom the property had become vested by alienation (*x*). There seems to be no doubt that where a title is deduced through joint tenants appearing on the face of the deeds to be entitled for their own benefit, the only course which is perfectly safe is to treat them as being so entitled for all purposes, and consequently to require proof of the discharge of all death duties which, if they were so entitled, would be a charge on the property in the purchaser's hands.

(*x*) See stat. 57 & 58 Vict. c. 30, s. 8 (4); above, p. 229, n. (*u*). Where lands have been mortgaged to two persons jointly, the mortgagor and his successors in title are not accountable under the same sub-section, as being "trustees or other persons in whom any interest in the property is vested," for any estate duty which may have become payable on the death of one of the mortgagees; they are in the position of debtors; see *Matthew* v. *Northern Assurance Co.*, 9 Ch. D. 80. But if a debtor have notice of a charge created on the debt due from him, how can he safely pay the whole amount of the debt to the original creditor?

Practice as to inquiry as to succession and estate duty where joint tenant has died.

At the same time the writer believes that hitherto it has not been the practice to inquire respecting the payment of estate duty on the death of one of several joint mortgagees, unless there is good reason (as there would be in the case above put of a joint investment by father and son) to suppose that the parties are not or may not be trustees. The only justification for this course seems to be that joint mortgagees are so generally trustees that the risk run in omitting the inquiry is really very small, and the inconvenience consequent upon asking is exceedingly great. Whenever it is proposed to sell land under a title comprising a conveyance by the survivor of joint mortgagees, and the deceased mortgagee died after the 1st of August, 1894 (*y*), it is advisable to make a special stipulation in the conditions or contract of sale that no inquiry shall be made or objection taken as to any estate duty that may have become payable on such death (*z*). Where several persons appear to have been entitled to lands as joint tenants, but not by way of mortgage, it has not been the practice to refrain from inquiry as to the discharge of any death duties which may have become payable on the death of one of them on the ground that they are likely to have been trustees: on the contrary, regard is had to the fact that omission to inquire as to the payment of estate or succession duty on the death of one of them would leave the purchaser with an unsatisfied charge on the face of his title, and so prevent him from getting a good marketable title (*a*).

(*y*) The date of the commencement of that part of the Finance Act, 1894, which imposes estate duty; stat. 57 & 58 Vict. c. 30, s. 24.

(*z*) For a form of such a condition, see Appendix A., General Condition 18, below.

Position of joint mortgagees when the right of redemption barred.

(*a*) This point arose under the contract which was the subject of the decision in *Re Chafer and Randall's Contract*, 1916, 2 Ch. 8 (above, p. 227); but it seems that no requisition was made as to duty on the death of J. W. Neil, the deceased joint tenant; see 61 Sol. J. 129. Theoretically, omission to make the like inquiry wth respect to estate duty payable on the death of a joint mortgagee leaves the title equally open to objection: but, as we have seen (above, pp. 228, 229), before the Finance Act, 1894, when succession duty only was payable, there was no necessity to make the inquiry, and the difference arising under that Act with respect to estate duty has hardly yet been appreciated by the profession generally. It should not be forgotten that joint mortgagees, who have been obliged to foreclose, or who have had to take possession and have acquired a title barring the equity of redemption under the Statute of Limitations, have become owners of the whole estate in the lands and not merely of a charge thereon; and on the subsequent death of one of them any succession duty which might become payable would be a charge on the survivors' estate in the lands, so that inquiry as to the payment thereof could no longer be safely dis-

Notice of a document, how far notice of its contents.

It is said, speaking generally, that notice of any document is notice of its contents: but as a rule this statement is only applicable subject to the following qualifications:—If a purchaser of any land have notice of some document, which must necessarily affect, or is stated to affect, the title to the land, then he ought to inquire as to its contents; and if he omit to prosecute this inquiry, he will be affected with notice of its contents and of any equitable interest disclosed by its contents. And if the document must necessarily affect the title, he will have notice of its contents (if he have notice of the document), notwithstanding that he were told that the document did not affect the title. But if the document be such as may or may not affect the title, and the purchaser ask, on receiving notice thereof, whether it does affect the title, and be told that it does not, he is justified, in the absence of any reason for suspecting the vendor's veracity or good faith, in accepting this statement as correct; and if he omit to peruse the document, he will not be fixed with notice of its contents or of any equity thereby disclosed (*b*). As already pointed out (*c*), however, it is imprudent not to require the production of a document, of which the purchaser has notice and which may or may not affect the title, because the document may disclose some *legal* estate or interest adverse to the vendor's title, and the purchaser would take subject to this, whether he had notice of the contents of the document or not.

Notice, actual or constructive.

Notice of trusts, equities or similar matters, may be either actual or constructive. Actual notice to the person principally concerned himself, *e.g.*, to a purchaser personally, calls for no remark; but it may be observed that the term "constructive notice" is applied to two kinds of notice, namely, the notice which is imputed to a person principally concerned where he acts through a solicitor or other agent, and the notice which is imputed to a person where he or his agent has not made such inquiry or investigation as ought to have been made. The law

pensed with; see *Re Loveridge*, 1904, 1 Ch. 518. By the Conveyancing Act, 1911 (stat. 1 & 2 Geo. V. c. 37), s. 9, trustee-mortgagees hold, after the right of redemption is barred, upon trust for sale.

(*b*) *Jones* v. *Smith*, 1 Ph. 244, 253, 254; *Patman* v. *Harland*, 17 Ch. D. 353, 356, 357; *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221, 230; *English and Scottish Mercantile Investment Co.* v. *Brunton*, 1892, 2 Q. B. 1, 700; *Re Valletort, &c. Co., Ltd.*, 1903, 2 Ch. 654; Cozens-Hardy, M. R., *Re Chafer and Randall's Contract*, 1916, 2 Ch. 8, 19.

(*c*) Above, pp. 123, 124.

with respect to notice is now contained in the following section of the Conveyancing Act, 1882 (*d*):—

Restriction on constructive notice.

Sect. 3, sub-sect. 1.—A purchaser (*e*) shall not be prejudicially affected by notice of any instrument, fact or thing, unless—

(i) It is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Sub-sect. 2.—This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

Sub-sect. 3.—A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

Sub-sect. 4.—This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act (*f*), the rights of the parties shall not be affected by this section.

Notice to agent.

Sub-sect. 1 (i) of the above enactment appears to be no more than a statement of the previously existing law (*g*). But sub-sect. 1 (ii) of the above section has made a substantial alteration of the law. Before this Act came into operation, it was necessary, as a general rule, in order that a purchaser might be affected by notice to his counsel, solicitor, or other agent, that the agent should be affected with notice in the same trans-

The previous law as to connected transactions.

(*d*) Stat. 45 & 46 Vict. c. 39, s. 3.

(*e*) By sect. 1 (2) (ii) in this Act, "purchaser" includes a lessee or mortgagee, or an intending purchaser, lessee or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and "purchase" has a meaning corresponding with that of "purchaser."

(*f*) Immediately after the 31st Dec. 1882; sect. 1 (2).

(*g*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 35; *Berwick & Co.* v. *Price*, 1905, 1 Ch. 632, 639; see *Jones* v. *Smith*, 1 Hare, 43, 1 Ph. 244; *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Carter* v. *Williams*, L. R. 9 Eq. 678; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Patman* v. *Harland*, 17 Ch. D. 353; *Kettlewell* v. *Watson*, 21 Ch. D. 685; above, pp. 195, 196.

action in which the question of notice to the principal arose (*h*). But where one transaction was closely followed by and connected with another, or where it was clear that a previous transaction was present to the mind of the agent when engaged in another transaction, the principal was affected by notice to the agent, although received in the previous transaction (*i*). This exception to the general rule has been removed by the above section. Thus, where A. first mortgaged his share under the trusts of a will to B., who was his solicitor and was also the solicitor of the trustees of the will, and this mortgage was afterwards transferred to C. and then to D., B. acting as C.'s and D.'s solicitor; and within a year after the transfer to D., A. mortgaged the same property to E., when B. acted as A.'s and E.'s solicitor; and E. was the first to give actual notice of his charge to the trustees, who had no personal knowledge of the previous mortgage: it was held that E. was not affected with notice of the previous mortgage by reason of B. having acted as his solicitor, and E.'s charge had accordingly priority over D.'s (*k*).

Effect of the Act.

Re Cousins.

Reason for the rule that notice to the agent is notice to the principal.

The rule that a purchaser is affected by notice to his counsel, solicitor or other agent (*l*), seems to rest on this ground:—When a man employs such agents to transact his business he holds them out to the world as standing in his own place and representing himself; in fact, as being identical, for the purposes of the business which he has authorised them to transact, with his own person. He must therefore accept this representation of himself by another, which is the consequence of his own act in employing an agent, as complete for *all* the purposes of such business, and cannot justly be permitted to sever the identity of person created by him so as to repudiate notice or knowledge given to or acquired by the agent, but not in fact communicated to the principal (*m*). It is therefore said that, when the relation of principal and agent and the duty of the agent to communicate any matter to the principal have been established, an irrebuttable

(*h*) Sug. V. & P. 757; Fisher on Mortgages, 6th ed., § 1070.

(*i*) *Hargreaves* v. *Rothwell,* 1 Keen, 154, 159; Sug. V. & P. 757; see the cases stated below, pp. 236—238.

(*k*) *Re Cousins,* 31 Ch. D. 671; and see below, p. 238; *Re Valletort, &c. Co., Ltd.*, 1903, 2 Ch. 654, 663. And as to notice in the same transaction, see *Meyer* v. *Charters,* 34 T. L. R. 589.

(*l*) Sug. V. & P. 756.

(*m*) See *Kennedy* v. *Green,* 3 My. & K. 699, 719; *Boursot* v. *Savage,* L. R. 2 Eq. 134; cf. *Blackburn* v. *Vigors,* 17 Q. B. D. 553, 12 App. Cas. 531; *Blackburn* v. *Haslam,* 21 Q. B. D. 144.

presumption arises that the agent communicated the matter to the principal; hence evidence is not admissible to prove that the agent did not in fact communicate his knowledge to the principal (*n*).

Exception in case of agent's fraud.

The rule is, however, subject to the exception that, if the matter, of which it is sought to affect the principal with notice, be the agent's own fraud or fraudulent dealing or some equity arising thereout (*o*), or if the agent during the time of his employment as such, and when he acquired the information in question, was a party to a scheme of fraud (*p*), then the principal is permitted to give evidence to rebut the above presumption and to prove his ignorance of the matter; for the supposition that the agent communicated his own fraud to the principal is too improbable to be entertained even by a Court of Equity.

Exclusion of exception where notice is independent of the fraud.

Some very fine distinctions were taken with regard to the above rule and its exception before the passing of the Conveyancing Act, 1882 (*q*). Thus it was decided that, where a solicitor has been or is acting fraudulently, but the circumstances are such that if the purchaser were represented by another solicitor innocent of the fraud, that solicitor would be put upon inquiry and so affected with notice of some equity other than that arising out of the fraud, the client will be affected with notice of this equity, notwithstanding the solicitor's fraud (*r*). And it was even held, that where in the same transaction a solicitor is engaged in committing a fraud, but has notice of some equity independent of that arising out of his fraud—as where he is a trustee engaged in wrongfully disposing of the trust property for his own benefit—any person who is his client in that transaction will be affected with notice of such independent equity, notwithstanding that, if the client were represented by another solicitor, that solicitor would not be put upon inquiry (*s*). And it was considered that, where the matter of which notice is sought to be imputed is not the solicitor's own

(*n*) Fry, J., *Kettlewell* v. *Watson*, 21 Ch. D. 685, 704-707; *Berwick & Co.* v. *Price*, 1905, 1 Ch. 632, 639, 640.
(*o*) *Kennedy* v. *Green*, 3 My. & K. 699, 720; *Cave* v. *Cave*, 15 Ch. D. 639, 645; *Berwick & Co.* v. *Price*, 1905, 1 Ch. 632-640.
(*p*) *Sharpe* v. *Foy*, L. R. 4 Ch. 35; *Re Southampton's Estate*, 16 Ch. D. 178, 184; Fry, J., *Kettlewell* v. *Watson*, 21 Ch. D. 685, 707.
(*q*) Above, p. 233.
(*r*) See *Kennedy* v. *Green*, 3 My. & K. 699.
(*s*) See *Boursot* v. *Savage*, L. R. 2 Eq. 134.

fraud or unjust dealing, the mere fact that it was fraudulent or wrongful of the solicitor to conceal the matter from the client is not sufficient to exempt the client from the consequences of the rule (*t*).

Examples: *Kennedy* v. *Green.*

For example, where a solicitor fraudulently induced a client, who was a mortgagee of leaseholds, to execute (without receiving any money) a deed conveying the legal estate to him as upon a transfer of the mortgage, and having subsequently acquired the equity of redemption mortgaged the whole property to another, for whom he acted as solicitor in the transaction, it was held that the latter mortgagee was not affected with constructive notice of the solicitor's fraud on the original mortgagee. But, it appearing that the peculiar form of the deed of transfer of the mortgage and of the receipt endorsed thereon were sufficient to put a solicitor innocent of the fraud upon inquiry whether any money had been paid on the execution of the transfer, it was considered that the latter mortgagee was affected through the solicitor with notice of the equity arising from the fact that no money had been paid, notwithstanding the solicitor's fraud (*u*).

Boursot v. *Savage.*

So, where a solicitor, being one of three trustees entitled to certain leasehold land, the trust not being disclosed on the face of the title deeds, sold and assigned the land to a purchaser, for whom he acted as solicitor, by forging the signatures of his co-trustees to a letter of authority to sell and to the deed of assignment, and it was considered that the deed was a nullity on their part, but passed the legal estate in one-third of the land, the Court held that the purchaser was affected, through the solicitor, with notice of the trusts; for it was said that if the client would be affected with constructive notice of a trust, the existence of which is known to his solicitor, in the case where there was no fraud, the fact that the solicitor was committing a fraud in relation to the trust could not afford any reason why the client should not be affected with constructive notice of the existence of the trust (*x*). The application of the rule, where the solicitor had notice of some equity not arising out of his own fraud and the only fraud was in his concealment thereof from his client, is illustrated by the following cases:—A solicitor took a mort-

(*t*) *Atterbury* v. *Wallis,* 8 De G., M. & G., 454, 466; *Rolland* v. *Hart,* L. R. 6 Ch. 678, 682, 683.

(*u*) *Kennedy* v. *Green,* 3 My. & K. 699; see also *Re Southampton's Estate,* 16 Ch. D. 178, 184.

(*x*) *Boursot* v. *Savage,* L. R. 2 Eq. 134.

gage of an equity of redemption and sub-mortgaged it. Soon afterwards he and the first mortgagee and the mortgagor joined in a new mortgage of part of the property, he acting as solicitor of all the parties to the transaction and suppressing all mention of the sub-mortgage. It was held that the new mortgagee was affected, through the solicitor, with notice of the sub-mortgage; notwithstanding that it was fraudulent or wrongful of the solicitor to conceal the sub-mortgage from him (*y*). A solicitor entitled to an equitable interest in land in Middlesex mortgaged the same to A. by deposit of title deeds and letters of charge, which were not registered. He afterwards mortgaged the same interest by registered deed to B., for whom he acted as solicitor in the transaction. It was held that B. must be taken to have had notice of A.'s mortgage, the Court refusing to find a ground of exception from the general rule in the fact that it was to the solicitor's interest to conceal the prior mortgage from A., and declining to presume that in this conflict of interest and duty the solicitor consulted his own interest in preference to performing his duty to his client (*z*).

Atterbury v. *Wallis.*

Bradley v. *Riches.*

The exception to the rule was allowed to prevail in *Sharpe* v. *Foy* (*a*), where a husband and wife mortgaged land, to which the wife was entitled at common law, but which was subject to a covenant for settlement. The same solicitor acted for the mortgagors and the mortgagee. The mortgagors informed the solicitor of the existence of the covenant, but it was agreed between them that the matter should not be mentioned to the mortgagee. It was decided that the mortgagee was not affected, through the solicitor, with notice of the covenant, as the solicitor was party to a scheme of fraud. Again, in *Cave* v. *Cave* (*b*), a solicitor, who was the sole trustee of a marriage settlement, wrongfully applied part of the trust funds in the purchase of certain land, which was conveyed to his brother. A. advanced to the brother 4,500*l*. on a first mortgage of this land. The solicitor acted for A. in this transaction, but represented to A. that his brother was the owner of the land, and that the mortgage contained absolute covenants for title by the brother. The

Exception not excluded.

Sharpe v. *Foy.*

Cave v. *Cave.*

(*y*) *Atterbury* v. *Wallis,* 8 De G., M. & G. 454; see also *Rolland* v. *Hart,* L. R. 6 Ch. 678.
(*z*) *Bradley* v. *Riches,* 9 Ch. D. 189.
(*a*) L. R. 4 Ch. 35.
(*b*) 15 Ch. D. 639.

solicitor also raised loans for his brother from other persons on mortgage of the same land. In these circumstances the Court found that the trust funds were applied in purchase of the land in pursuance of a scheme of fraud to which the solicitor was a party, his design from the first being to enable his brother to raise money on mortgage of the land; and it was held that A. was not affected, through the solicitor, with notice of the equities in favour of the *cestui-que-trusts* under the settlement.

Effect on exception of Conveyancing Act, 1882, s.3.

Section 3 (3) of the Conveyancing Act, 1882 (*c*), preserves to principals the benefit of the exception established as above mentioned (*d*) in the case of the agent's fraud. But the effect of the distinctions drawn with regard to this exception has been greatly lessened by the operation of sub-section (1) (ii) of the same enactment. Thus, in *Taylor* v. *London and County Banking Co.* (*e*), one Tasker had appropriated part of certain mortgages to which he was entitled in satisfaction of a breach of trust committed by him as trustee of the Brockman settlement. Afterwards, on the appointment of Nixon as a new trustee of the Tasker settlement, whereof Tasker had been previously sole trustee and had apparently converted part of the trust funds to his own use, Tasker transferred these mortgages to Nixon and himself, representing that they were part of the funds subject to the trusts of the Tasker settlement; and in this business Tasker acted as Nixon's solicitor. It was argued for the persons entitled under the Brockman settlement (*f*), on the authority of *Boursot* v. *Savage* (*g*), that notice of the equity in their favour must be imputed to Nixon in consequence of Tasker having so acted as his solicitor. But it was held (*h*) that the doctrine laid down in *Boursot* v. *Savage* is now subject to the modifications introduced by the 3rd section of the Conveyancing Act, 1882 (*i*); and that, as knowledge of the appropriation to the Brockman settlement did not come to Tasker as Nixon's solicitor or in the same transaction in which the question of notice arose, Nixon could not be affected thereby. The principle of this decision appears to affect not only the case of *Boursot* v. *Savage,* but those of *Atterbury* v. *Wallis* and *Bradley*

Taylor v. *London and County Bank.*

(*c*) Above, p. 233.
(*d*) Above, p. 235.
(*e*) 1901, 2 Ch. 231.
(*f*) 1901, 2 Ch. 242.
(*g*) L. R. 2 Eq. 134; above, p. 236.
(*h*) 1901, 2 Ch. 257-259.
(*i*) Above, p. 233.

v. *Riches* (*k*) as well. For in neither of these cases was the knowledge sought to be imputed to the client acquired by the solicitor in his capacity of solicitor for that client or in the transaction in which the question of notice arose.

Vendor or mortgagor acting as purchaser's or mortgagee's solicitor.

As a general rule, a purchaser is affected by notice to his counsel, solicitor, or other agent, notwithstanding that the agent be also employed as the agent of the vendor (*l*) or be himself the vendor (*m*). But when the vendor is a solicitor or other agent, it must appear clearly that he acted generally as the solicitor or agent of the purchaser in the transaction, in order that the knowledge of the agent may be imputed to the purchaser. The purchaser will not be affected with notice if the vendor be merely employed to prepare the conveyance (*n*). The rule is the same between mortgagor and mortgagee (*o*).

What inquiries ought a purchaser to make?

It will be observed that, under the Conveyancing Act, 1882 (*p*), a purchaser will not be affected with notice of anything which would not have come to the knowledge of himself or his agent if such inquiries and inspections had been made by the one or the other as ought reasonably to have been made. The question then arises, what inquiries and inspections ought reasonably to be made? The answer to this appears to be: such inquiries and inspections as are usually made by a prudent purchaser buying under an open contract (*q*); for, as we have seen (*r*), a purchaser buying under special conditions limiting his right to investigate the vendor's title is fixed with constructive notice of all equitable incumbrances which he would

(*k*) Above, p. 237.

(*l*) *Le Neve* v. *Le Neve*, Amb. 436; *Dryden* v. *Frost*, 3 My. & Cr. 670; *Rolland* v. *Hart*, L. R. 6 Ch. 678.

(*m*) *Kettlewell* v. *Watson*, 21 Ch. D. 685.

(*n*) *Espin* v. *Pemberton*, 3 De G. & J. 547, 554; *Kettlewell* v. *Watson*, 21 Ch. D. 685.

(*o*) See the cases cited in the three preceding notes and above, pp. 236–238.

(*p*) Above, p. 233.

(*q*) *Wilson* v. *Hart*, L. R. 1 Ch. 463, 467; *Patman* v. *Harland*, 17 Ch. D. 353, 355-358; *Oliver* v. *Hinton*, 1899, 2 Ch. 264; *Berwick & Co.* v. *Price*, 1905, 1 Ch. 632, 638; *Perham* v. *Kempster*, 1907, 1 Ch. 373, 379; see also *Re Castell and Brown, Ltd.*, 1898, 1 Ch. 315, 320; *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487; *Wilkes* v. *Spooner*, 1911, 2 K. B. 473, 484, 486. And circumstances giving notice of fiduciary relationship may render necessary inquiry as to title to dispose of property; see *Jameson* v. *Union Bank of Scotland*, 109 L. T. 850.

(*r*) Above, p. 195; see also *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231, 258.

have discovered if he had made such inquiries. And it should be noted that a purchaser or mortgagee taking the legal estate, but omitting to make reasonable and proper inquiries and inspections, will be affected with notice of such prior equities as he would have discovered if he had made such inquiries, although the omission to make the inquiries did not arise from any fraudulent motive, but was simply owing to gross negligence. Thus, where a purchaser bought land in good faith through an agent, who was not a solicitor, and required no abstract of title nor production of the title deeds, and the deeds were in the possession of an equitable mortgagee, it was held that the purchaser, to whom the legal estate had been conveyed, took the same with constructive notice of and subject to the charge created by the deposit of the deeds (*s*). Where, however, a purchaser makes due inquiry for the title deeds and a reasonable excuse is given for their non-production, he will not be affected with notice of any equity arising out of their absence, and may, if he obtain the legal estate, avail himself of it and of the defence of purchaser for value in good faith without notice as against all persons asserting any such equity (*t*).

Oliver v. *Hinton.*

Notice that property is subject to charges or incumbrances.

Jones v. *Williams.*

Where a purchaser has notice that the property bought is subject to charges or incumbrances, he must inquire what these are, or he will be taken to have had notice of them all. Thus, where one took a legal mortgage from two partners of property formerly belonging to them and a third partner since retired as tenants in common, and the retiring partner had by deed conveyed his share in the property to the continuing partners "subject to all charges and mortgages affecting the same," and this deed was recited in the mortgage without the words in inverted commas, and the mortgagee, knowing of two equitable

(*s*) *Oliver* v. *Hinton,* 1899, 2 Ch. 264; and see *Berwick & Co.* v. *Price,* 1905, 1 Ch. 632; *Walker* v. *Linom,* 1907, 2 Ch. 104. By "gross negligence" something more is meant than mere carelessness; it must at least be carelessness of so aggravated a nature as to amount to the neglect of precautions which the ordinarily reasonable man would have observed and to indicate an attitude of mental indifference to obvious risks: per Eve, J., in *Hudston* v. *Viney,* 1921, 1 Ch. 98, 104, where it was held that the conduct there in question—the omission to inquire into the earlier title—was not gross negligence.

(*t*) *Hewitt* v. *Loosemore,* 9 Hare, 449, 458; and see *Hunt* v. *Elmes,* 2 De G., F. & J. 578; *Ratcliffe* v. *Barnard,* L. R. 6 Ch. 652; *Agra Bank* v. *Barry,* L. R. 7 H. L. 135. 157; *Northern Counties of England Fire Insurance Co.* v. *Whipp,* 26 Ch. D. 482; *Re Ingham,* 1893, 1 Ch. 352. See also *Molyneux* v. *Hawtrey,* 1903, 2 K. B. 487.

charges on the property and believing that these were all the incumbrances, made no inquiry whether this was the case or whether there were any other mortgages or charges, it was held that the mortgagee was affected with notice of a third equitable charge which existed on the property (*u*). So, where lands were mortgaged subject to land tax and tithe rentcharge and "to all other payments and outgoings, ecclesiastical or civil, charged upon or payable out of the said lands," and the mortgagee made no inquiry what other payments and outgoings there were to which the lands were subject, it was decided that he had constructive notice of an annual rent of a certain quantity of corn charged thereon in equity (*x*).

Re Alms Corn Charity.

§ 2.—*Of Sales by Trustees.*

The first observation to be made with regard to sales by trustees is that trustees holding the legal estate in lands under a simple trust for the benefit of some other person or persons have no power to sell without the consent of all the persons who are in equity beneficially entitled to the lands (*y*). In such cases the trustee is but an instrument to execute the will of *cestui que trust*. The latter may sell as he will, and the trustee is bound to convey at his bidding (*z*). But the trustee cannot bind any beneficiary by contract with or conveyance to any purchaser who has notice of the trust: although conveyance of the trust property by the trustee to a *bonâ fide* purchaser for value without notice of the trust may deprive the *cestui que trust* of his equitable rights in the land (*a*). To enable trustees to sell lands without the concurrence of their *cestui que trusts* an express power to that effect must be inserted in the instrument creating the trust, or the lands must be vested in them upon a special trust for sale. When such powers of or trusts for sale are created they must be carried out in all respects according to the intention of their creator; they must not, for

Sales by trustees.

Trusts for or powers of sale.

(*u*) *Jones* v. *Williams*, 24 Beav. 47.
(*x*) *Re Alms Corn Charity*, 1901, 2 Ch. 750.
(*y*) *Lee* v. *Soames*, 36 W. R. 884; and see *Re Hailes and Hutchinson's Contract*, 1920, 1 Ch. 233, 237, where there was a trust to divide the property; cf. *Re Baker and Selmon's Contract*, 1907, 1 Ch. 238, where the *cestui que trusts* had in writing authorised the trustee to sell, and were bound at law by the contract as undisclosed principals; see above, p. 24, and n. (*x*); below, Chap. XIX. § 2.
(*z*) See above, p. 150.
(*a*) Wms. Real Prop. 196, 197, 23rd ed.

Time for exercising.

example, be exercised before the time at which it has been declared that they shall arise (*b*). Thus, when lands are vested in trustees on trust for one for life, and after his death on trust for sale or on trust for others with power of sale, the trust for or power of sale cannot be validly exercised in the lifetime of the tenant for life—not even with his consent and concurrence (*c*), nor by order of the Court (*d*). But the intention of the author of a trust or power will be collected from the whole of the instrument creating the same, and may sometimes be ascertained at the sacrifice of the literal interpretation of some of the expressions therein contained. Thus, where lands were devised to one for life, and after her death to trustees to sell as soon as conveniently might be after the testator's death, it was held that the will in effect created a trust for sale immediately, exercisable with the consent of the tenant for life (*e*). So a devise on trust to sell with all convenient speed and within five years after the testator's death has been held to enable the trustees to make a good title to a purchaser after the five years had expired, the testator's expressions being considered to be merely directory and not imperative (*f*). A trust for sale with all convenient speed nevertheless allows the trustees to exercise a reasonable discretion as to the time of sale (*g*), and they may postpone the sale if such a course be beneficial to their *cestui que trusts* (*h*). But trustees for immediate sale, who postpone

Mills v. *Dugmore.*

Trust for sale with all convenient speed.

(*b*) See *Johnstone* v. *Baber,* 8 Beav. 233; Sug. Pow. 266, 8th ed.; Farwell on Powers, 169, 3rd ed.

(*c*) *Mosley* v. *Hide,* 17 Q. B. 91; *Want* v. *Stallibrass,* L. R. 8 Ex. 175; *Re Bryant and Barningham's Contract,* 44 Ch. D. 218; *Re Head's Trustees and Macdonald,* 45 Ch. D. 310; see also *Re Milner and Organ's Contract,* 64 Sol. J. 463, 464. A sale may of course be made in such cases with the concurrence of all the beneficiaries, if *sui juris,* or the tenant for life may sell under the Settled Land Acts; see above, pp. 154, 169.

(*d*) *Blacklow* v. *Laws,* 2 Hare, 40; *Johnstone* v. *Baber,* 8 Beav. 233; *Gosling* v. *Carter,* 1 Coll. 644, 652; *Carlyon* v. *Truscott,* L. R. 20 Eq. 348.

(*e*) *Mills* v. *Dugmore,* 30 Beav. 104.

(*f*) *Pearce* v. *Gardner,* 10 Hare, 287; see also *Cuff* v. *Hall,* 1 Jur. N. S. 972, where a will conferred a power to postpone sales, but not for a longer period than ten years from the testator's death.

(*g*) *Buxton* v. *Buxton,* 1 My. & Cr. 80, 93; *Marsden* v. *Kent,* 5 Ch. D. 598. For the purpose of determining the respective rights of tenant for life and remainderman, one year is considered to be the time within which such a trust might reasonably have been exercised; *Parry* v. *Warrington,* 6 Madd. 155; *Vickers* v. *Scott,* 3 My. & K. 500; James, L. J., *Re Davidson,* 11 Ch. D. 341, 348.

(*h*) *Morris* v. *Morris,* 4 Jur. N. S. 802.

sale indefinitely without good reason, will be accountable for any loss thereby caused to the trust estate (*i*).

Acceleration of time for exercising a power or trust.

When lands are settled on several persons for successive life estates, with power for each tenant for life when in possession to charge the estate with a jointure or portions, it appears that, as such charges are a burden on the remainderman, the time for exercising the power cannot be accelerated by the surrender to any tenant for life of a life estate prior to his own; he must wait, before he can well exercise the power, until the time has arrived when he would have become entitled in possession according to the limitations of the settlement. But where lands are so settled with a power of sale exercisable with the consent of the tenant for life in possession, the power, being merely administrative and only altering the state of investment of the trust property and not diminishing the remainderman's interest, may be exercised with the consent of a tenant for life in actual possession, although so entitled through the surrender of a prior life estate (*k*). Where lands are vested in trustees on trust for one for life and after his death on trust for sale or on trust for others with power of sale, so that the settlor's intention is that the trust or power shall not arise until such death (*l*), the time for exercising the same cannot be accelerated by a surrender of the life interest (*m*).

Trusts for sale and settlement of the purchase-money.

When lands are settled by deed on trust for sale, and to hold the proceeds of sale for the benefit of certain persons successively and after their death for their children or others absolutely, which is a very common form of marriage settlement, it is usually provided that the sale shall be made at the request or with the consent of the tenants or tenant for life, and after the death of every tenant for life at the discretion of the trustees (*n*).

(*i*) *Cuff* v. *Hall*, 1 Jur. N. S. 972; *Devaynes* v. *Robinson*, 24 Beav. 86; *Fry* v. *Fry*, 27 Beav. 144. See *Re Davidson*, 11 Ch. D. 341, 348, on the question how far concurrence in the postponement of a sale directed to be made with all convenient speed may amount to an election by the beneficiaries to take the property *in specie*.

(*k*) *Truell* v. *Tysson*, 21 Beav. 437; Sug. Pow. 270, 271, 8th ed.; Farwell on Powers, 175, 3rd ed.

(*l*) Above, p. 242.

(*m*) See *Coxe* v. *Day*, 13 East, 118; *Re Head's Trustees and Macdonald*, 45 Ch. D. 310.

(*n*) 3 Davidson, Prec. Conv. 858. 3rd ed.; Williams on Settlements, 125; 2 Key & Elph. Prec. Conv. 506, 4th ed.; 609, 10th ed.

In such cases there is no intention that the trustees should proceed to sell immediately (*o*); the trust is well exercised if the sale be made during the lifetime of any tenant for life or within a reasonable time after the beneficiaries entitled to the capital of the purchase-money have become entitled in possession (*p*). If, however, the lands remain unsold for a long time after the interests of all persons absolutely entitled to the proceeds of sale have vested in possession, the question arises whether they have not elected to take the property *in specie*, and so put an end to the trust for sale (*q*). There can be no effective election to take the property as real estate so long as any one of the beneficiaries is not *sui juris;* for they must *all* so elect in order to put an end to the trust for sale (*r*). And the trust for sale does not come to an end merely because all the beneficiaries are absolutely entitled and *sui juris*, or being such have concurred in requesting the postponement of the sale: but the intention of all of them to take their shares as real estate must be expressly or impliedly declared (*s*). If the beneficiaries under a trust for sale of land do all effectually elect to take the property as realty, the special trust for sale ceases, and the trustees thenceforth hold the land under a simple trust for the beneficiaries, and cannot therefore make any sale without their concurrence (*t*). Purchasers were therefore obliged to inquire, when any trust for sale created a long time ago was proposed to be exercised, whether there had been any such election as would put an end to the trust for sale. But by the Conveyancing Act, 1911 (*u*), where land has, either

Election to take the property as real estate.

(*o*) See 1 Dart, V. & P. 59, 5th ed.; 64, 6th ed.; 66, 7th ed.

(*p*) *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Tweedie and Miles*, 27 Ch. D. 315; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296, 313; *Re Horsnaill*, 1909, 1 Ch. 631, 635.

(*q*) *Crabtree* v. *Bramble*, 3 Atk. 680; *Davies* v. *Ashford*, 15 Sim. 42; *Mutlow* v. *Bigg*, 1 Ch. D. 385; *Re Gordon*, 6 Ch. D. 531; *Re Davidson*, 11 Ch. D. 341; *Holder* v. *Lofts*, cited *Re Lewis*, 30 Ch. D. 654, 656; and see *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296; *Re Grimthorpe*, 1908, 2 Ch. 675; *Re O'Grady's Settlement*, 1916, 2 A. C. 231.

(*r*) *Re Douglas and Powell's Contract*, 1902, 1 Ch. 296, 312; *Re Jenkins and Randall's Contract*, 1903, 2 Ch. 362; *Re Horsnaill*, 1909, 1 Ch. 631, 635; *Re Sturt*, 1922, 1 Ch. 416.

(*s*) See *Re Davidson*, 11 Ch. D. 341, 348, 349; *Re Tweedie and Miles*, 27 Ch. D. 315; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296, 312, 313; *Re Horsnaill*, 1909, 1 Ch. 631, 635.

(*t*) See above, p. 241.

(*u*) Stat. 1 & 2 Geo. V. c. 37, s. 10 (3). This sub-section applies to sales made before as well as after the commencement of the Act, but without prejudice to the order of any Court restraining a sale; sub-s. 4.

before or after the commencement of this Act, become subject to an express or implied trust for sale, such trust is, so far as regards the safety and protection of any purchaser thereunder, to be deemed to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale. It is thought that, since the Act, a purchaser buying under a trust for sale created a long time ago need not inquire whether the beneficiaries have elected to take the property as real estate: but that he *should* ask if the land sold, or any land subject to the same trust for sale, has been conveyed to or under the direction of the persons interested in the proceeds of sale. If this question be answered in the negative (*x*), it is thought the purchaser may accept a conveyance from the trustees for sale alone: otherwise he should ask to be satisfied as to the absence of any election putting an end to the trust for sale, and require the concurrence of the beneficiaries, if necessary. If it should appear on the face of the abstract that the beneficiaries have elected to take the property *in specie*, it is thought that their concurrence could not safely be dispensed with.

Trusts for sale now deemed to subsist until land conveyed to beneficiaries.

The same question of election by the beneficiaries to take the property may of course arise in the case of a trust for sale created by will (*y*). If a trust for sale be declared by a will merely for the purposes of a settlement made by the will of the purchase-money, the same considerations apply with regard to the time of sale as in the case of a like settlement made by deed (*z*). Trusts declared by will for the sale of lands are, however, generally created for the purpose, amongst other objects, of raising money to pay the testator's debts, or debts and legacies; and in all well-drawn wills a power for the trustees to postpone the sale is invariably inserted (*a*). Such a power remains effective until all the beneficial interests in the settled property have vested absolutely in possession; and where the whole of certain lands are devised to trustees on trust for sale with power at their discretion to postpone the sale, and

Trusts for sale created by will.

Power to postpone sale.

Re Horsnaill.

(*x*) See above, pp. 123, 124, 232, 233.
(*y*) See note (*q*), above, p. 244.
(*z*) See 1 Dart, V. & P. 59, 5th ed.; 64, 6th ed.; 66, 7th ed.; and cases cited in nn. (*p*), (*q*), above, p. 244.
(*a*) 4 Davidson, Prec. Conv. 6, 7, 49, 3rd ed.; 2 Key & Elph. Prec. Conv. 781, 782, 788, 4th ed.; 871, 872, 10th ed.; Davidson's Concise Precedents, 595, 604, 19th ed.

the proceeds of sale are bequeathed in definite shares, each share being given in trust for one for life with remainder to his or her children, the vesting in possession of one or more of the shares will not put an end to the power of postponement, which will continue until all the shares have vested absolutely in possession (*b*).

Trusts declared by will for sale in order to pay testator's debts.

Trusts created by will for sale of lands in order to pay the testator's debts appear to fall within the rule already mentioned (*c*) with regard to the time for exercising the power given by statute to sell real estate charged by will with debts (*d*) —namely, that if the sale be made within twenty years after the testator's death, the purchaser is not bound to inquire whether any of the testator's debts remain unpaid. After the expiration of that period, the purchaser should inquire whether any debts remain unpaid, if the only object of the trust for sale be to raise money to pay debts; but of course if the trusts of the purchase-money be not only to pay debts, but to hold the surplus on trust for certain persons in succession, the question of the propriety of selling a long time after the testator's death depends on the same considerations as occur in other cases of settlements.

Executors' power of sale under the Land Transfer Act, 1897.

As we have seen, the powers given to executors by the Land Transfer Act, 1897 (*e*), of selling their testator's real estate to satisfy his debts appear to be governed by the same rules as were previously applicable to sales by executors of their testator's leaseholds (*f*); so that if real estate be sold by executors under such powers more than twenty years after the testator's death, the purchaser will be entitled to presume that the sale is rightly made, and need not inquire whether any of the testator's debts remain unpaid, though he must ask if they have assented to any devise of the lands sold. In regard to the general question of the time for exercising trusts for sale, Lord St. Leonards observed that "people who deal with trustees raising money at a considerable distance of time, and without an apparent reason for so doing, must be considered as under some obligation to inquire and look fairly at what they are about" (*g*). But it appears that an out-and-out trust for sale

(*b*) *Re Horsnaill*, 1909, 1 Ch. 631, 635; *Re Kipping*, 1914, 1 Ch. 62; though as regards shares in companies, which are capable of division *in specie*, the power may be to postpone for a reasonable time only; *Re Marshall*, 1914, 1 Ch. 192, 202.
(*c*) Above, p. 210, n. (*g*).
(*d*) Above, pp. 209, 210.
(*e*) Stat. 60 & 61 Vict. c. 65, s. 2; above, pp. 211-215.
(*f*) Above, pp. 201, 202, 210, n. (*g*).
(*g*) *Stroughill* v. *Anstey*, 1 De G., M. & G. 635, 654.

of lands, if not determined by the beneficiaries' election, may be exercised after any lapse of time (*h*). The above-mentioned enactment of the Conveyancing Act, 1911 (*i*), applies to trusts for sale created by will as well as by deed.

Rule against perpetuities in connection with trusts for and powers of sale.

A trust for or power of sale of lands to arise at a future time is invalid, unless so limited that it must necessarily become exercisable within the period allowed by the rule against perpetuities (*k*). But a trust for sale arising immediately, and at once effecting a conversion into personalty of the beneficial interest in the lands to be sold, is not obnoxious to the rule against perpetuities, although no limit of time be mentioned within which the trust must be exercised (*l*). And it is established that powers of sale immediately conferred on trustees over property comprised in settlements are not invalid for want of an express declaration that they must be exercised within the time given by the rule against perpetuities (*m*). Such powers are therefore exercisable within the period so allowed, though not, as a rule, after the settlement has come to an end by the vesting in possession of the estate in fee simple in remainder or reversion or other the absolute interest in the property settled (*n*). But such powers may remain exercisable after absolute interests have vested in possession, if such were the intention of the donor of the power, so long as the rule against perpetuities is not infringed. Thus, where the absolute

(*h*) See above, p. 244, nn. (*p*), (*q*).

(*i*) Stat. 1 & 2 Geo. V. c. 37, s. 10 (3); above, p. 244.

(*k*) *Re Daveron*, 1893, 3 Ch. 421; *Goodier* v. *Edmunds*, *ib.* 455; *Re Appleby*, 1903, 1 Ch. 565; cf. *Re Davies and Kent's Contract*, 1910, W. N. 104; and see *Re Haygarth*, 1912, 1 Ch. 510; *English* v. *Cliff*, 1914, 2 Ch. 376; *Re Bullock's Will Trusts*, 1915, 1 Ch. 493, 496; *Re Garnham*, 1916, 2 Ch. 413, 416. But if the trusts of the proceeds of sale be not obnoxious to the rule against perpetuities, they will be valid as trusts of the land in an unconverted state, notwithstanding that the trust for sale be void for remoteness; see cases above cited.

(*l*) *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Tweedie and Miles*, 27 Ch. D. 315; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296, 313.

(*m*) *Biddle* v. *Perkins*, 4 Sim. 135; *Boyce* v. *Hanning*, 2 Cr. & J. 334; *Waring* v. *Coventry*, 1 My. & K. 249; *Wood* v. *White*, 4 My. & Cr. 460, 482; *Lantsbery* v. *Collier*, 2 K. & J. 709; *Peters* v. *Lewes, &c. Ry.*, 18 Ch. D. 429, 433, 434; Sug. Pow. 848-851, 8th ed.; 1 Jarm. Wills, 291, 4th ed.; 261, 5th ed.; 1 Dart, V. & P. 68, 69, 6th ed.; 69, 7th ed.; Farwell on Powers, 127, 3rd ed.

(*n*) *Wolley* v. *Jenkins*, 23 Beav. 53; 3 Jur. N. S. 324; *Taite* v. *Swinstead*, 26 Beav. 525; *Re Brown's Settlement*, L. R. 10 Eq. 349; Sug. Pow. 859-862, 8th ed.; 3 Davidson, Prec. Conv. 570-577, 3rd ed.; Farwell on Powers, 38, 39, 3rd ed.

interest in any settled property is ultimately limited to several persons as tenants in common, and a power of sale is given with the intention that it shall be exercised for the purpose of facilitating the division of the property after their interests have vested in possession, the power is exercisable within a reasonable time after such interests have so vested, provided that the limits allowed by the rule against perpetuities be not exceeded (*o*). If property be given to trustees in trust for persons entitled, not successively, but for immediate absolute interests therein, it seems that a power of sale given to the trustees, and not limited as to the time of its exercise, would be void (*p*); but if some of the beneficiaries were infants, the power might perhaps be exercisable during their minority.

Order of the Court for administration of the trust.

Where trustees hold lands under a trust for or with power of sale, and an order of the Court has been made for the administration of the trust, they cannot properly exercise the trust or power without the direction of the Court (*q*).

Duties of trustees for sale.

The duties of trustees for sale, whether acting under a trust for or power of sale, are to sell the trust property to the best advantage: that is, in the manner most beneficial to all the *cestui que trusts;* to receive the purchase-money and dispose of it in due accordance with the trusts; to obtain proper advice as to the value of the trust property, and the best mode of sale (*r*): and generally to take all other precautions which a prudent man of business would take in conducting his own affairs (*s*). Trustees for sale should be especially careful to avoid any misdescription in the particulars or contract of the property, which they are entrusted to sell (*t*), for if by their negligence in this respect the trust estate should suffer any loss,

Misdescription by trustees for sale.

(*o*) *Re Cotton's Trustees and the School Board for London,* 19 Ch. D. 624; *Re Sudeley and Baines & Co.,* 1894, 1 Ch. 334; *Re Jump,* 1903, 1 Ch. 129; *Re Horsnaill,* 1900, 1 Ch. 631, 635; cf. *Re Dyson and Fowke,* 1893, 2 Ch. 720, 725.

(*p*) *Taite* v. *Swinstead,* 26 Beav. 525, 529; cf. *Re Dyson and Fowke, ubi sup.*

(*q*) Lewin on Trusts, 374, 391, 6th ed.; 493, 526, 11th ed.; *Price* v. *Price,* 35 Ch. D. 297; see above, p. 207.

(*r*) Jessel, M. R., *Re Cooper and Allen* to *Harlech,* 4 Ch. D. 802, 815.

(*s*) *Speight* v. *Gaunt,* 22 Ch. D. 727, 9 App. Cas. 1; see also *Falkner* v. *Equitable Reversionary Society,* 4 Drew. 352.

(*t*) See above, p. 64.

it appears that they would be liable to make it good (*u*). Under the Trustee Act, 1893 (*x*), where a trust for sale or a power of sale of property is vested in a trustee by any instrument coming into operation after the year 1881, he may, in the absence of any expression of a contrary intention, sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction or to rescind any contract for sale and to re-sell, without being answerable for any loss. These powers are similar to those which were generally inserted in instruments made before the year 1882 and creating trusts for or powers of sale (*y*); but neither the express nor the statutory powers appear to confer on trustees much greater authority or discretion than they possess independently of them under the rules of equity (*z*).

Powers given to them by Trustee Act, 1893.

(*u*) See *White* v. *Cuddon*, 8 Cl. & Fin. 766, 788, 789, 793, 798. It is thought that trustees for sale are justified in stipulating either that no compensation shall be allowed for errors of description (which seems best for them), or that compensation shall be allowed, and that on either side, for such errors, as it does not appear that either of these conditions is depreciatory; see *Hill* v. *Buckley*, 17 Ves. 395; *Crompton* v. *Melbourne*, 5 Sim. 353; *Hobson* v. *Bell*, 2 Beav. 17, 19, 23; *Dunn* v. *Flood*, 28 Ch. D. 586, 591 *sq.*; 1 Key & Elph. Prec. Conv. 267, n. (*e*), 4th ed.; 285, n. (*c*), 10th ed.; above, p. 60; below, Chap. XII., § 4.

(*x*) Stat. 56 & 57 Vict. c. 53, s. 13, replacing 44 & 45 Vict. c. 41, s. 35.

(*y*) Like powers were given by Lord Cranworth's Act to trustees having an express power of sale over any hereditaments by virtue of an instrument executed on or after the 28th Aug. 1860; stat. 23 & 24 Vict. c. 145, ss. 1, 2, 34; but these powers were not usually relied on in practice; Davidson, Prec. Conv. vol. iii. 557, 565, n. (*u*), 858, 1013-1018, 3rd ed.; vol. iv. 33, n. (*h*), 4th ed.

(*z*) Thus, in the absence of any restriction as to the mode of sale, trustees for sale might sell the trust property either all together or in lots, and either by public auction or private contract; Sug. V. & P. 60, 61; Lewin on Trusts, 383, 384, 6th ed., 514, 517, 12th ed. They might make such special conditions of sale as might be reasonable and necessary in the state of their title; *Hobson* v. *Bell*, 2 Beav. 17; *Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352; Lewin on Trusts, 384, 6th ed.; but they might not depreciate the trust property by unnecessary conditions of sale; *Dance* v. *Goldingham*, L. R. 8 Ch. 902. They might concur with other persons in selling the trust property together with other property, if such a mode of sale were clearly advantageous to the *cestui que trusts*, and the trustees took due precautions to ascertain that they would receive a proper proportion of the purchase-money, and were careful to receive the money themselves; but otherwise not; *Rede* v. *Oakes*, 4 De G., J. & S. 505; *Re Cooper and*

Powers of trustees for sale under the rules of equity.

And in exercising either the statutory or similar express powers, trustees are bound to apply the same principles which should regulate their action in the absence of express authority. In both cases Courts of Equity exact a strict adherence to the duties of trustees for sale (*a*). Thus it was held that trustees, expressly empowered to make such special conditions of sale as they might think fit, were no more at liberty to make depreciatory conditions of sale, unless strictly necessary in the state of their title, than were trustees who had no such express authority. And if depreciatory conditions were unnecessarily made on a sale by trustees, the Court would restrain the sale at the instance of any *cestui que trust* (*b*), or the purchaser might resist the specific performance of the contract (*c*). In this particular instance, however, the legislature has interposed; and with regard to sales made after the 24th of December, 1888, it is now enacted as follows (*d*):—

(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

Allen to Harlech, 4 Ch. D. 802, 814-821. They might consequently join with the owners of prior charges in selling the whole property free from incumbrances, or they might sell the particular interest only, which had been vested in them on trust for sale, whichever course would be likely to be most advantageous to their *cestui que trusts;* see 4 Ch. D. 817. Trustees were justified in fixing a reserved price on a sale by auction, and they might buy in at that price; *Re Peyton's Settlement*, 30 Beav. 252; Sug. V. & P. 62; but if, after buying in, they made undue delay in effecting a sale, they were answerable for any loss occasioned thereby; *Taylor* v. *Tabrum*, 6 Sim. 281. It appears also that trustees might vary or rescind any contract for sale, if such a course clearly appeared to be for the advantage of their *cestui que trusts; Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352; Lewin on Trusts, 384, 6th ed., 516, 12th ed.

(*a*) *Dance* v. *Goldingham*, L. R. 8 Ch. 902, 907, n., 909, 910; *Dunn* v. *Flood*, 25 Ch. D. 629, 634, 28 Ch. D. 586, 591, 592.

(*b*) *Dance* v. *Goldingham*, L. R. 8 Ch. 902.

(*c*) *Rede* v. *Oakes*, 4 De G., J. & S. 505; *Dunn* v. *Flood*, 25 Ch. D. 629, 28 Ch. D. 586.

(*d*) Stat. 56 & 57 Vict. c. 53, s. 14, replacing 51 & 52 Vict. c. 59, s. 3.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

Trustees are, moreover, expressly empowered to sell subject to any of the stipulations implied in contracts by virtue of the Vendor and Purchaser Act, 1874 (*e*), or the Conveyancing Act, 1881 (*f*). Subject to these enactments, however, trustees for sale must still exercise the discretions conferred upon them by the above-mentioned statutory powers (*g*) in a reasonable manner, and with an eye to obtaining the best advantage they can for their *cestui que trusts* (*h*).

Trustees for sale must sell for money.

It is important to note, with regard to the exercise of a trust for or power of sale, that the term "sale" is, as a rule, taken in the strict sense of conveyance in consideration of a price paid in money (*i*). Trustees acting under a trust for or power of sale are not, therefore, at liberty to accept any other consideration for their conveyance than the payment of money. They must not, for example, sell in consideration of receiving stock, shares, bonds, debentures or similar securities (*i*), or in consideration of the grant of a rentcharge (*k*), unless the terms of the trust or power specially authorize them to convey for such considerations (*l*). For trustees are bound strictly to pursue

(*e*) Stat. 56 & 57 Vict. c. 53, s. 15, replacing 37 & 38 Vict. c. 78, s. 3.

(*f*) Stat. 44 & 45 Vict. c. 41, s. 66.

(*g*) Above, p. 249.

(*h*) Above, p. 249, n. (*z*).

(*i*) Above, p. 1; Stirling, J., *Payne* v. *Cork Co., Ltd.*, 1900, 1 Ch. 308, 314; see also *Re A. B.*, 1899, W. N. 233; and cf. *Re Ware*, 1892, 1 Ch. 344. In *Re Sutton's Contract*, 65 Sol. J. 259, P. O. Lawrence, J., held that a tenant for life, selling under his statutory power, might sell for a sum of consols, upon the ground that consols were as good as cash, but, for the reasons given by the author in an article in 65 Sol. Journ., p. 286, it is submitted that the decision cannot be supported on general grounds, though it should be noticed that the vendor there had become absolutely entitled, and it was only the existence of prior charges which made it necessary for him to exercise the statutory power.

(*k*) *Read* v. *Shaw*, Sug. Pow. 953, 8th ed.; ibid. 864; cf. *Re Ware*, 1892, 1 Ch. 344; Farwell on Powers, 622, 3rd ed.

(*l*) See *Re Morgan*, 24 Ch. D. 114, 115; and *Mayor of Scarborough* v. *Cooper*, 1910, 1 Ch. 68, as to sale by a municipal corporation under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 109. In *Re Jackson*, 44 Sol. J. 573, it was held that trustees empowered to sell a testator's real estate, "upon such terms and conditions and generally in such manner as they could do if absolute owners thereof," were at liberty to sell either wholly or partly in consideration of a fee farm rent.

the powers or authorities, with which the creator of the trust has invested them; and they cannot, as a rule, obtain any enlargement of their authority by an application to the Court (*m*). So, also, a conveyance by way of exchange or partition is not a valid execution of a trust for or power of sale (*n*). But trustees for sale, who are authorized to invest the purchase-money on real securities, may well agree to leave a proper proportion of the purchase-money on mortgage of the lands sold (*o*).

Whether a trust for or power of sale authorizes a mortgage.

A trust for or power of sale created for the purpose of effecting an out-and-out conversion of lands into money does not authorize a mortgage of the lands (*p*). But if the intention of the author of the trust or power were simply to facilitate the raising of a sum of money charged on the lands, and not to disturb the ownership of the lands further than should be necessary in order to satisfy the charge, a mortgage made under the trust or power may be supported as a conditional sale (*q*).

Whether a trust or power to mortgage authorizes a sale, or a mortgage with power of sale.

A trust or power to mortgage lands does not authorize a sale of them (*r*). Upon this ground it has been held that a power to mortgage lands does not authorize a mortgage

(*m*) See *Re Morrison*, 1901, 1 Ch. 701; *Re New*, 1901, 2 Ch. 534, 544, 545; *Re Tollemache*, 1903, 1 Ch. 457, 955. This rule is, however, subject to an exception where, owing to circumstances unforeseen by the author of the trust, there arises some emergency which can only be met by taking a course of action not expressly authorized; and in such cases, but in such cases only, the Court may and, if it thinks fit, will sanction the performance by the trustees of acts of this kind; see the two cases last cited; and *Re Wells*, 1903, 1 Ch. 848.

(*n*) *M'Queen* v. *Farquhar*, 11 Ves. 467; Sug. Pow. 857, 858, 8th ed. But where there is a power of sale and investment of the proceeds in the purchase of other hereditaments, it appears that an exchange or a partition may be effected circuitously by sale and investment of the purchase-money in the lands desired to be taken in exchange or held in severalty; Sug. Pow. 858, 8th ed. As to effecting a partition under a power of sale *and exchange*, see *Re Frith and Osborne*, 3 Ch. D. 618.

(*o*) Observe the terms of the contract for sale under the Settled Land Acts sanctioned by the House of Lords in *Bruce* v. *Ailesbury*, 1892, A. C. 356, 357; and see *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97; *Bettyes* v. *Maynard*, 31 W. R. 461; *Re Hotham*, 1902, 2 Ch. 575; and compare as to sale by a mortgagee, below, Chap. IX., § 3. Such a contract may be enforced specifically; *Starkey* v. *Barton*, 1909, 1 Ch. 284.

(*p*) *Haldenby* v. *Spofforth*, 1 Beav. 390; *Stroughill* v. *Anstey*, 1 1 De G., M. & G. 635; *Page* v. *Cooper*, 16 Beav. 396; *Devaynes* v. *Robinson*, 24 Beav. 86.

(*q*) See *Stroughill* v. *Anstey*, 1 De G., M. & G. 465; *Page* v. *Cooper*, 16 Beav. 400; Sug. Pow. 425, 8th ed.; Lewin on Trusts, 377, 6th ed.; 503, 12th ed.

(*r*) *Drake* v. *Whitmore*, 5 De G. & S. 619; *Cook* v. *Dawson*, 29 Beav. 123.

of them with power of sale (*s*); but in later cases this rule has been abandoned in favour of the doctrine that a power of sale is a usual and a necessary incident of a mortgage, and may therefore properly be inserted in a mortgage made under a trust or power to mortgage (*t*). A trust for sale of lands does not authorize a lease of them, so that a trustee for sale of leaseholds is not justified in disposing of them by way of underlease at an improved rent (*u*).

Sale of leaseholds by way of underlease.

But where leaseholds are vested in trustees for sale they are justified in making a sale of them by way of underlease—that is, in granting an underlease for the whole term less a day or two at the rent at which they hold in consideration of receiving a lump sum of money—if such a course be advantageous to the trust estate; for this method of disposition is essentially a transfer in consideration of a price in money, that is, a sale, and the assurance of the property by way of underlease is regarded as mere machinery for making the conveyance to the purchaser (*x*). Thus if such trustees propose to sell their leaseholds in lots, as they lawfully may (*y*), they may well sell them under the usual conditions that the purchaser of the largest lot in value shall take an assignment of the lease and grant to the other purchasers underleases at apportioned rents, and that in case any of the lots shall not be sold the vendors themselves shall grant similar underleases (*z*). So also, if such trustees hold land let together with other land for a term of years at one entire rent, they may well sell their land by way

(*s*) *Clarke* v. *Royal Panopticon*, 4 Drew. 26.

(*t*) *Bridges* v. *Longman*, 24 Beav. 27, 29; *Cook* v. *Dawson*, 29 Beav. 123, 128; *Re Chawner's Will*, L. R. 8 Eq. 569; *Cruikshank* v. *Duffin*, L. R. 13 Eq. 555; Dav. Prec. Conv., vol. 2, pt. 2, pp. 85, 482, 4th ed.; Farwell on Powers, 506-508, 3rd ed.

(*u*) *Evans* v. *Jackson*, 8 Sim. 217. An executor or administrator, however, where the assets include leaseholds, may grant an underlease if such a mode of disposition be beneficial to the estate, but not otherwise, and the title of the underlessee is dependent on the underlease being beneficial; Wms. Exors. 939, 940, 7th ed; 700, 701, 11th ed.; *Keating* v. *Keating*, Ll. & G. *t.* Sug. 133; *Hackett* v. *M'Namara*, Ll. & G. *t.* Plunk. 283; *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236, 243.

(*x*) *Re Judd and Poland and Skelcher's Contract*, 1906, 1 Ch. 684, overruling *Re Walker and Oakshott's Contract*, 1901, 2 Ch. 383; and see *Re Webb*, 1897, 1 Ch. 144, 149; above, pp. 1, 251.

(*y*) Above, p. 249.

(*z*) *Re Judd and Poland and Skelcher's Contract*, ubi sup.; see above, p. 78; below, Chap. X. § 2; Appendix A., Special Condition 8.

of underlease at an apportioned rent (*a*). And it appears that trustees for sale will be justified in selling leaseholds by way of underlease in any circumstances in which such a course is expedient in the interests of their *cestui que trusts* (*b*).

Timber and minerals.

Trustees for sale of land, unless expressly authorized by the instrument creating the trust, are not entitled to sell the land apart from the timber growing thereon (*c*), or to sell the surface reserving the mines and minerals thereunder (*d*). But under the Trustee Act, 1893 (*e*), replacing an Act of 1862 (*f*), the High Court may sanction the sale by a trustee, or other person authorized to sell land, of the land with an exception or reservation of any minerals, or of the minerals separately from the rest of the land, and in each case either with or without rights and powers of and incidental to the working, getting or carrying away of the minerals. And when such sanction has been once obtained, the trustee or other person may make such sales from time to time without any further application to the Court, unless forbidden by the instrument creating the trust or authority to sell (*g*). It has been held that executors selling under the power of sale given by the Land Transfer Act, 1897 (*h*), are not subject to this law, and are at liberty to sell the surface, reserving the mines (or *vice versâ*) without obtaining the leave of the Court under the above Act (*i*). Trustees for sale of land should not agree to sell at a price to be fixed by valuation; for that would be a delegation of their discretion to

Sale by executors of surface apart from mines.

Trustees should not sell at a valuation.

(*a*) *Re Webb*, 1897, 1 Ch. 144, approved, *Re Judd and Poland and Skelcher's Contract*, 1906, 1 Ch. 684, 690, 691.

(*b*) See note (*x*), above, p. 253.

(*c*) *Cholmely* v. *Paxton*, 3 Bing. 207, 5 Bing. 48; *S. C.* nom. *Cockerell* v. *Cholmeley*, 10 B. & C. 564, 3 Russ. 565, 1 R. & M. 418, 1 Cl. & Fin. 60.

(*d*) *Buckley* v. *Howell*, 29 Beav. 546. See 3 Davidson, Prec. Conv. 295, 3rd ed.; Dart, V. & P. 68, 1184, 5th ed.; 76, 1296, 6th ed.; 77, 1117, 1134, 7th ed.

(*e*) Stat. 56 & 57 Vict. c. 53, s. 44, amended by 57 & 58 Vict. c. 10, s. 3, and extending to dispositions by way of exchange, partition or enfranchisement by a trustee or other person authorized so to dispose of land.

(*f*) Stat. 25 & 26 Vict. c. 108.

(*g*) Stat. 56 & 57 Vict. c. 53, s. 44 (2), amended by 57 & 58 Vict. c. 10, s. 4.

(*h*) Stat. 60 & 61 Vict. c. 65, s. 2 (2); above, pp. 212, 214.

(*i*) *Re Chaplin's Contract*, 1922, W. N. 260, reversing *S. C.*, ib. 156, and overruling *Re Wicksted's Trusts*, 1921, 2 Ch. 184, and confirming the law laid down in *Re Cavendish and Arnold's Contract*, 1912, W. N. 83.

decide what price they will accept (*k*). On these grounds it appears that they ought not to enter into a contract for sale containing the usual stipulations (*l*) as to taking timber at a valuation; but they should sell the whole property together at one price (*m*). The same reasoning is applicable in the case of fixtures. But a stipulation on a sale by trustees that the purchaser shall pay a fixed sum for the timber or fixtures in addition to the price of the land does not appear to be objectionable; as that is, in effect, a sale of the whole property at one price settled by the trustees themselves (*n*). A trustee for sale is not entitled to enter into an agreement giving some person an option to purchase the property at a future time (*o*).

Option of purchase.

It must not be forgotten, in considering a title depending on the exercise by trustees of a trust for or power of sale, that the capacity to exercise the trust or power is not necessarily co-incident with the devolution of the legal estate. It is not every person succeeding to an estate given in trust who is competent to execute a discretionary trust or power connected therewith; on the contrary, the general rule is that such a trust or power can only be well executed by the persons whom the author of the trust has designated for the purpose, and in whom he has placed his confidence accordingly (*p*). Thus in

What persons, besides the original trustees, can exercise a trust for or power of sale.

(*k*) *Peters* v. *Lewes & East Grinstead Ry. Co.*, 16 Ch. D. 703, 713, 18 Ch. D. 429, 437; *Re Wilton's Settled Estates*, 1907, 1 Ch. 50, 55; 1 Dart, V. & P. 79, 5th ed.; 90, 6th ed.; 89, 7th ed.

(*l*) Above, pp. **55, 64.**

(*m*) 1 Davidson, Prec. Conv. 522, 4th ed., 434, 5th ed. In *Re Llewellin*, 37 Ch. D. 317, a tenant for life without impeachment of waste selling under the Settled Land Acts sold the settled land by auction with a stipulation that the purchaser should pay for the timber at a valuation to be made in the usual way. The vendor claimed to have the amount of this valuation paid to him. It was decided that he was not entitled to this. But no suggestion was made that the sale was invalid as an exercise of the statutory power on the ground that the price of the timber was to be ascertained by valuation. The remainderman was probably content with the result of the sale. But in *Re Wilton's Settled Estates*, 1907, 1 Ch. 50, 55, it was laid down that a tenant for life selling under the Settled Land Acts ought not to sell at a price to be fixed by somebody else.

(*n*) See *Cockerell* v. *Cholmeley*, 10 B. & C. 564, 571.

(*o*) *Clay* v. *Rufford*, 5 De G. & Sm. 768, 779, 780; *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236.

(*p*) *Crewe* v. *Dicken*, 4 Ves. 97; *Cole* v. *Wade*, 16 Ves. 27, 46, 47; *Re Crunden and Meux's Contract*, 1909, 1 Ch. 690, 695, 696; and see the cases cited below, pp. 257, 258, and *Re Rumney and Smith*, 1897, 2 Ch. 351, 356, 359, 360. It does not appear that this rule was intended to be impugned by the remarks of Farwell, J., in *Re Smith*, 1904, 1 Ch. 139, 142.

every case in which such a trust or power is exercised by any other persons than those originally entrusted therewith, the question arises whether the persons who purport to act in exercise of the trust or power are expressly or impliedly authorized to execute the same. On this point the law is as follows:—

As to trusts or powers coupled with an interest.

Survivorship of the trust.

Disclaimer.

New trustees.

First, with respect to discretionary trusts or powers coupled with an estate or interest, as where lands are vested in trustees in fee upon trust for or with power of sale. If several trustees be invested with such a trust or power, the same may be exercised by the survivors or survivor of them for the time being, unless a contrary intention should have been expressed in the instrument creating the trust (*q*). And if one or more of the trustees should disclaim, the trust or power may be exercised by the other trustees or trustee (*r*). Every new trustee duly appointed under the statutory power to appoint trustees—whether conferred by Lord Cranworth's Act (*s*), the Conveyancing Act, 1881 (*t*), or the Trustee Act, 1893 (*u*)—has the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee, and so can well

(*q*) So enacted as to trusts constituted after or created by instruments coming into operation after the 31st Dec. 1881; stat. 56 & 57 Vict. c. 53, s. 22, replacing 44 & 45 Vict. c. 41, s. 38. But with respect to trusts or powers coupled with an interest, these enactments did no more than declare the previous law; Co. Litt. 113a; *Warburton* v. *Sandys*, 14 Sim. 622; *Watson* v. *Pearson*, 2 Ex. 581, 594; *Lane* v. *Debenham*, 11 Hare, 188; Lewin on Trusts, 230, 509, 510, 6th ed.; 298, 755, 12th ed.; *Re Bacon*, 1907, 1 Ch. 475.

Disclaimer by a trustee.

(*r*) Co. Litt. 113a; Jenk. Cent. 44; *Crewe* v. *Dicken*, 4 Ves. 97, 100; *Granville* v. *McNeile*, 7 Hare, 156. It is now settled that disclaimer of the estate, as well as of the office, of a trustee may be made by conduct only and need not be evidenced by matter of record or by deed; *Re Birchall*, 40 Ch. D. 436; Lewin on Trusts, 176, 177, 6th ed.; 220, 221, 12th ed. It must not be forgotten that, where one is appointed executor and trustee of a will, refusal to act as executor, and even renunciation of probate, is not in itself a disclaimer of the trusteeship or of any estate in or power over land devised or given to the trustees of the will; but it may be evidence of such disclaimer; Lewin on Trusts, 12th ed.; *Re Gordon*, 6 Ch. D. 531, 534. A trustee cannot disclaim the office of trustee after he has accepted it by acting in the trust, nor can he disclaim a part of the trusts imposed upon him by one instrument, and accept the rest of them; Lewin on Trusts, 181, 6th ed.; 227, 12th ed.; *Urch* v. *Walker*, 3 My. & Cr. 702; *Doe* v. *Harris*, 16 M. & W. 517, 524; *Re Lord and Fullerton's Contract*, 1896, 1 Ch. 228. As to the effect of a disclaimer by all the trustees or the only trustee, see *Mallott* v. *Wilson*, 1903, 2 Ch. 494; below, p. 260, and nn. (*c*), (*d*); and as to retracting a disclaimer, see *Re Young*, 1913, 1 Ch. 272, 276.

(*s*) Stat. 23 & 24 Vict. c. 145, s. 27.

(*t*) Stat. 44 & 45 Vict. c. 41, s. 31 (5).

(*u*) Stat. 56 & 57 Vict. c. 53, s. 10 (3).

exercise such a trust or power, after the estate has been properly vested in him. Any new trustee duly appointed under an express power has equal authority in this respect (*x*). And the same authority is now conferred by statute upon every trustee appointed by a Court of competent jurisdiction (*y*). With respect to the exercise of such a trust or power as we are considering after the death of a sole or the last surviving trustee, the established principle appears to have been that the same was exercisable by the persons who succeeded to the legal estate after his death, if the author of the trust had either expressly or impliedly authorized such persons to execute the same; but otherwise not (*z*). Thus, where lands had been vested in A. and B. in fee in trust that they, A. and B. (naming them, but not mentioning their heirs or other legal representatives), should sell the same, it does not appear that under the old law of the descent of trust estates (*a*), the heir (*b*), or since the Conveyancing Act, 1881 (*c*), the executors or administrators of the surviving trustee, could well execute the trust (*d*). In this respect, however, the law was altered by the Conveyancing Act, 1911 (*e*), with regard to trusts constituted after or created by instruments coming into operation after the year 1881. For as to such trusts it is enacted (*e*) that, subject to any direction to the contrary contained in the instrument (if any) creating

Trustees appointed by the Court.

Persons succeeding to the estate on the death of a sole or last surviving trustee.

Powers of personal representatives of a sole or surviving trustee under Conveyancing Act, 1911.

(*x*) Such authority was expressly conferred in the old common form of power to appoint new trustees: but if not expressly conferred, it would be implied from the very fact that the creator of the trust expressly authorized the appointment of new trustees; Lewin on Trusts, 507, 6th ed.; 760, 12th ed.

(*y*) Stat. 56 & 57 Vict. c. 53, s. 37, replacing 44 & 45 Vict. c. 41, s. 33, and 23 & 24 Vict. c. 145, s. 27. Before the enactment last cited, new trustees appointed by the Court and not by virtue of an express power to appoint new trustees could not, as a general rule, exercise arbitrary or special discretionary powers conferred upon the original trustees, unless such powers should have been expressly or impliedly extended to the trustees for the time being; *Fordyce* v. *Bridges*, 2 Ph. 497, 510; *Newman* v. *Warner*, 1 Sim. N. S. 457; *Bartley* v. *Bartley*, 3 Drew. 384; *Byam* v. *Byam*, 19 Beav. 58.

(*z*) Above, p. 255, and n. (*p*).

(*a*) Above, p. 202.

(*b*) *Mortimer* v. *Ireland*, 11 Jur. 721; Lewin on Trusts, 202, 6th ed.; 256, 12th ed.

(*c*) Stat. 44 & 45 Vict. c. 41, s. 30; above, p. 204.

(*d*) *Re Ingleby and Boak, &c.*, 13 L. R. Ir. 326; *Re Crunden and Meux's Contract*, 1909, 1 Ch. 690. But distinguish the cases mentioned in note (*i*), p. 258, below.

(*e*) Stat. 1 & 2 Geo. V. c. 37, s. 8, sub-ss. 1-3. This section does not apply to land of copyhold or customary tenure vested in the tenant on the court rolls on trust; sub-s. 5.

the trust, until the appointment of new trustees, the personal representatives or representative (*f*) for the time being of a sole trustee, or where there were two or more trustees, then of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to or capable of being exercised by the sole or last surviving or continuing trustee.

The law and practice before the Conveyancing Act, 1881.

According to the old conveyancing practice in force before the commencement of the Conveyancing Act, 1881 (*g*), it was usual, where real estate was vested in trustees in fee on trust for or with power of sale, to provide expressly that the trust or power should be exercisable by the trustees originally appointed or the survivors or survivor of them, or the heirs of such survivor (*h*); and in such cases there was no doubt that the heir of the last surviving trustee could well execute the trust or power if he took the legal estate (*i*). But where lands were vested in trustees in fee on trust that they or the survivors or survivor of them or the heirs of such survivor should sell the same, and the surviving trustee devised the trust estate, it was held that the devisee, not being authorized by the creator of the trust to execute the trust for sale, could not make a good title on a sale of the lands (*k*). And in such a case, it may be noted, the heir could not execute the trust, for he had no estate in the land (*l*). Where lands were vested in trustees in fee in trust that they or the survivors or survivor of them or the heirs or *assigns* of such survivor should sell the same, it was held that the devisee of the last surviving trustee, being one of the persons expressly designated by the author of the trust, could well execute the trust for sale (*m*). It was held by Jessel, M. R.,

Heir of sole or surviving trustee.

Cooke v. *Crawford.*

Devisee.

Titley v. *Wolstenholme.*

(*f*) In this section "personal representative" means an executor (original or by representation) or administrator, but does not include an executor who has renounced or has not proved; sub-s. 4.

(*g*) Stat. 44 & 45 Vict. c. 41, which came into operation after the 31st Dec. 1881; s. 1 (2).

(*h*) Davidson, Prec. Conv. vol. i. p. 333, 4th ed.; vol. iii. pp. 858, 1271, 3rd ed.; vol. iv. p. 32, and note, 3rd ed.

(*i*) See Lewin on Trusts, 202, 6th ed.; 256, 12th ed. So the heir of the last surviving trustee could sell under a limitation to trustees and their heirs on trust "for sale" or "to sell" or that the trustee for the time being should sell; *Re Morton and Hallett,* 15 Ch. D. 143, 145, 149; *Re Cunningham and Frayling,* 1891, 2 Ch. 567.

(*k*) *Cooke* v. *Crawford,* 13 Sim. 91; *Wilson* v. *Bennett,* 5 De G. & S. 475; *Stevens* v. *Austen,* 3 E. & E. 685.

(*l*) Lewin on Trusts, 202, 6th ed.; 256, 257, 12th ed.

(*m*) *Titley* v. *Wolstenholme,* 7 Beav. 425; *Hall* v. *May,* 3 K. & J. 585.

Osborne to Rowlett.

that where lands were devised to trustees and their heirs on trust for sale, it must be taken that the testator intended to annex the trust to the estate, and that the devisee of the surviving trustee could execute the trust for sale accordingly; and he considered that the preceding decision to the contrary (*n*) had been overruled (*o*). Subsequently, however, Baggallay and James, L. JJ., stated that they were not prepared to concur in this view (*p*), and Stirling, J., declared that he would hesitate to force upon a purchaser a title depending on the case of *Cooke* v. *Crawford* not being good law (*q*), and Parker, J., expressed his assent to these criticisms (*r*). It appears, therefore, that the decision of Jessel, M. R., in *Re Osborne to Rowlett* (*s*), in so far as it conflicts with the principle above stated (*t*), can no longer be regarded as good law.

Powers of personal representatives of sole or surviving trustee under Conveyancing Act, 1881—

As we have seen (*u*), since the Conveyancing Act, 1881 (*x*), took effect, real estate of inheritance vested in a sole trustee devolves, notwithstanding any testamentary disposition, upon his legal personal representatives in like manner as if the same were a chattel real vested in them, and they are to be deemed in law his heirs and assigns within the meaning of all trusts and powers. It appears, therefore, that under this Act the legal personal representatives of a sole or sole surviving trustee may well exercise such trusts or powers as we are discussing in all cases in which under the old law the estate would have descended to the heir, and the heir so taking the legal estate could have well executed the trust or power (*y*), and also in all cases where

(*n*) *Cooke* v. *Crawford*, 13 Sim. 91.
(*o*) *Osborne to Rowlett*, 13 Ch. D. 774.
(*p*) *Re Morton and Hallett*, 15 Ch. D. 143, 149, 150; and see *Re Ingleby and Boak*, 13 L. R. Ir. 326.
(*q*) *Re Rumney and Smith*, 1897, 2 Ch. 351, 357.
(*r*) *Re Crunden and Meux's Contract*, 1909, 1 Ch. 690.
(*s*) 13 Ch. D. 774.
(*t*) Pp. 257, 258.
(*u*) Above, p. 204.
(*x*) Stat. 44 & 45 Vict. c. 41, s. 30.
(*y*) See *Re Pixton and Tong's Contract*, 1897, W. N. 178; 46 W. R. 187; *Re Waidanis*, 1908, 1 Ch. 123, 125; *Re Routledge's Trusts*, 1909, 1 Ch. 280; *Re Crunden and Meux's Contract*, 1909, 1 Ch. 690, 698-700; above, p. 258, and note (*i*). It is thought that, although real estate of inheritance vested in a sole trustee descends on his death and intestacy to the heir pending the appointment of an administrator, the heir cannot now effectively execute during that interval any trust for sale, which he might, before the Conveyancing Act, 1881, have executed (above, p. 258). For since that Act the heir no longer takes an indefeasible estate, but acquires only an estate defeasible on the appoint-

the assigns, as well as the heirs, of the sole or last surviving trustee were authorized to execute the trust (*z*). And now, under the Conveyancing Act, 1911 (*a*), the personal representatives of a sole or last surviving trustee may exercise any power or trust *created after the year* 1881, which was given to or capable of being exercised by such trustee, unless some direction to the contrary be contained in the instrument creating the trust. But the authority of such legal personal representatives so to exercise the trusts or powers will cease upon the appointment duly made of new trustees in place of the deceased trustee, and thenceforward the new trustees will be the proper persons to execute the trust (*b*).

under Conveyancing Act, 1911.

Where lands have been devised to trustees in fee upon trust for sale, and the devise of the legal estate has failed by reason of the trustees' death in the testator's lifetime, or of their disclaimer, then, if the testator died before the commencement of the Land Transfer Act, 1897, his heir, and otherwise his personal representatives, would take the legal estate subject to the trusts declared by the will (*c*), but could not well execute the trust for sale (*d*); although in the latter case the personal representatives could, of course, exercise the power of sale given to them by the last-mentioned Act (*e*).

Failure of devise of legal estate to trustee.

It should be noted that a difficulty may arise as to the persons who are authorized to exercise a trust for or power of sale, where lands vested in a sole trustee in fee upon such a trust or with such a power have been devised by him (under the present law) to other persons than his executors. The Conveyancing Act, 1881 (*f*), does not expressly take away the power of devising real estate held in trust: it merely provides that, notwithstanding any testamentary disposition, the same shall

Question in case of a devise by a sole trustee under the present law.

ment of an administrator, in which event the property would vest in the administrator as from the time of the trustee's death; and the Act appears to transfer the power of executing such trusts from the heir to the trustee's personal representatives; see above, pp. 204, 205.

(*z*) See above, p. 258; and cases cited in the previous note.

(*a*) Stat. 1 & 2 Geo. V. c. 37, s. 8; above, p. 257.

(*b*) *Re Routledge's Trusts*, 1909, 1 Ch. 280; see above, p. 256.

(*c*) *Pitt* v. *Pelham*, Freem. Ch. 134; *Sonley* v. *Clockmakers' Co.*, 1 Bro. C. C. 81.

(*d*) *Robson* v. *Flight*, 4 De G., J. & S. 608, 613; Farwell on Powers, 520, 3rd ed.

(*e*) Above, p. 212.

(*f*) Stat. 44 & 45 Vict. c. 41, s. 30.

vest on the trustee's death in his legal personal representatives *in like manner as if the same were a chattel real vesting in them*. Now, when a man dies possessed of a chattel real, it vests at first in his legal personal representatives by virtue of their office, notwithstanding that he may have bequeathed it specifically; but on their assent to the bequest the legal estate therein passes at once to the specific legatee without any further conveyance (*g*). And if a man be possessed of a chattel real upon trust, he may nevertheless devise his estate therein to other persons than his executors (*h*). And should he do so, it does not appear that his executors could disregard the specific devise and execute the trusts themselves, although the chattel has vested in them in the first instance by virtue of their office, and they would, but for the specific devise, be the proper persons to execute the trust. Thus, where leaseholds had been conveyed to two trustees, *their executors or administrators* (without further words), upon certain trusts, and the survivor of the two trustees devised all estates vested in him on any trust to A. and B. upon the same trusts on which he held the same, and appointed A., B. and C. his executors, it was held that neither the devisees of the trust estate nor the executors could exercise the trusts; and that since by the bequest the testator had taken the legal estate from those persons who ought otherwise to have been the trustees, the appointment of new trustees was necessary (*i*). It seems, therefore, that where real estate of inheritance vested in a sole trustee for sale or with power of sale has been devised by him to other persons than his executors, then, if under the old law the trust or powers could not have been well executed by his devisee, a purchaser could not safely accept the title under a purported exercise of the trust or power either by the executors alone or by the executors and devisees together. And if the terms of the trust should have authorized the assigns of the trustees to exercise the trust or power, still a purchaser could scarcely be advised to accept a title under a purported exercise of the trust or power by the devisees in conjunction with the executors; for as the latter are to be deemed in law the deceased trustee's heirs *and assigns* within the meaning of all trusts and powers, it would be doubtful to what persons

Re Burtt.

(*g*) Above, p. 201.
(*h*) See stat. 7 Will. IV. & 1 Vict. c. 26, s. 3; Lewin on Trusts, 198, 6th ed.; 252, 12th ed.
(*i*) *Re Burtt*, 1 Drew. 319.

the purchase-money should be paid. In either case, therefore, the only safe course would seem to be to require the appointment of new trustees.

Power without an interest.

In the case of a power of sale given to trustees without any estate in the land, such as the power of sale usually inserted in settlements of land before the Settled Land Act, 1882, took effect, the rule is even more strict that the same can only be well exercised by the persons designated for this purpose by the donor of the power (*k*). It is now provided (*l*), with respect to executorships and trusts constituted after or created by instruments coming into operation after the year 1881, that a power given to two or more executors or trustees jointly may be exercised by the survivors or survivor of them for the time being, unless the contrary were expressed in the instrument creating the power. Independently of this enactment, the law respecting the survivorship of bare powers appears to be as follows:—

Survivorship of powers given to trustees.

Survivorship of bare powers.

General rule.

I. The general rule is that, when a bare power is given to two or more persons, it cannot, after the death of any one of them, be exercised by the survivor or survivors (*m*).

Powers given to executors.

II. When a bare power was given to two or more executors, words might be used, which showed an intention that the power should be annexed to the office of executor; and, in such a case, after the death of any one of them, the survivor or survivors were capable of exercising the power (*n*). When, therefore, a man by will gave a power to his executors, designating them as such without naming them (*o*), or designating them "his executors hereinafter named" (*p*), it was held that the power was annexed to the office of executor and might be exercised even by a sole surviving executor. Supposing that a man gave by will a mere power to two or more persons, designating them by their names, without any reference to the office of executor,

(*k*) *Townsend* v. *Wilson*, 1 B. & A. 608.

(*l*) Stat. 56 & 57 Vict. c. 53, s. 22, apparently extended to executors by s. 50, and replacing 44 & 45 Vict. c. 41, s. 38.

(*m*) Co. Litt. 112b, 113a; Sug. Pow. 126, 128; *Montefiore* v. *Brown*, 7 H. L. C. 241.

(*n*) *Brassey* v. *Chalmers*, 16 Beav. 233; 4 De G., M. & G. 528; Sug. Pow. 128; *Crawford* v. *Forshaw*, 1891, 2 Ch. 261.

(*o*) Jenk. Cent. 43, case 83.

(*p*) *Brassey* v. *Chalmers*, 4 De G., M. & G. 528, following *Houell* v. *Barnes*, Cro. Car. 382; *Crawford* v. *Forshaw*, 1891, 2 Ch. 261; *contra*, *Lock* v. *Loggin*, 1 And. 145.

and in a subsequent part of the will appointed the same persons executors: it would be an exceedingly nice question, to be determined by a consideration of the purposes for which the power was given, whether an intention were shown to annex the power to the office of executor, sufficient to take the case out of the general rule (*q*).

Powers arising by implication of law.

III. Powers of executors, which arose by implication of law, were annexed to the office, and might be exercised after the death of any executor, by the surviving executors for the time being or by a sole surviving executor (*r*).

Powers given to trustees.

IV. If a bare power were given to two or more trustees, and the words used in the instrument creating the trust showed that the power was intended to be annexed to the office of trustee and not to be conferred upon the donees as individuals, it appears that, after the death of one, the survivor or survivors could execute the power (*s*). But if no such intention appeared, the case fell within the general rule (*t*).

Powers given to a class.

V. It is said that, if a power be given to three or more persons, by a class designation and not by their names, for instance, "to my trustees," "to my sons," after the death of any of them, the authority will survive so long as the plural number remains (*u*). This is a doubtful proposition (*x*). It is submitted that if a man gave a power to his "trustees" without designating them by name, the case would have fallen within the preceding proposition (*y*).

Release and disclaimer of powers.

Under the Conveyancing Act, 1881 (*z*), a person to whom any power, whether coupled with an interest or not, is given

(*q*) See Sug. Pow. 127, 128; Jenk. Cent. 43, case 83; Hargrave's note (2) to Co. Litt. 113a; *Crawford* v. *Forshaw,* 1891, 2 Ch. 261, 266-269.

(*r*) Dyer, 371b, case 3; *Forbes* v. *Peacock,* 11 M. & W. 630, 639; Sug. Pow. 128.

(*s*) Romilly, M. R., *Byam* v. *Byam,* 19 Beav. 58, in which case the decision was that a power given to "the undersigned trustees" could, under the old law, be exercised by trustees appointed by the Court; see above, p. 257, n. (*y*); *Re Smith,* 1904, 1 Ch. 139.

(*t*) *Townsend* v. *Wilson,* 1 B. & A. 608; see *Hall* v. *Dewes,* Jac. 189; *Re Bacon,* 1907, 1 Ch. 475, 478.

(*u*) Sug. Pow. 128; *Lee* v. *Vincent,* Cro. Eliz. 26; Co. Litt. 113a.

(*x*) See *Sykes* v. *Sheard,* C. A., 2 De G., J. & S. 6, disapproved by Malins, V.-C., *Jefferys* v. *Marshall,* 19 W. R. 95; Farwell on Powers, 515, 3rd ed.

(*y*) See *Re Smith,* 1904, 1 Ch. 139.

(*z*) Stat. 44 & 45 Vict. c. 41, s. 52 (1), applying (by sub-s. 2) to powers created either before or after the commencement of the Act.

may by deed release or contract not to exercise the power. And under the Conveyancing Act, 1882 (*a*), any power, whether coupled with an interest or not, may be disclaimed by deed, after which the disclaiming party shall not be capable of exercising or joining in the exercise of the power; but the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power was given, unless the contrary were expressed in the instrument creating the power. With respect to powers coupled with an interest, these enactments did no more than declare the previous law (*b*). But a power simply collateral could not formerly be extinguished or suspended by release or any other means (*c*). And it appears that the disclaimer of such a collateral or bare power was formerly ineffectual (*d*); though where a bare power had been given to two or more persons and one of them had affected to disclaim the power, the power could not, as a rule, be well exercised by the other or others of them (*e*). But in the case of a power given by will to the testator's executors to sell his lands, if any of the executors refused to take administration of the will, the accepting executors or executor might by statute (*f*) exercise the power alone. And where a power was annexed to the office of executor, either by implication of law or by the testator's direction (*g*), an executor who renounced probate could not exercise the power (*h*); but the executors or

Power simply collateral.

Disclaimer of bare power.

(*a*) Stat. 45 & 46 Vict. c. 39, s. 6 (1, 2), applying (by sub-s. 3) to powers created either before or after the commencement of the Act.

(*b*) The donee of any power other than a power simply collateral might always release or contract not to exercise it: Sug. Pow. 82 *sq.*; *West* v. *Berney*, 1 R. & M. 431; *Smith* v. *Death*, 5 Madd. 371; *Horner* v. *Swann*, T. & R. 430; *Hurst* v. *Hurst*, 16 Beav. 372; *Isaac* v. *Hughes*, L. R. 9 Eq. 191. And if a power coupled with an estate or interest were given to any person, he might disclaim the estate and thus render himself incapable of exercising the power: Sug. Pow. 50; *Hawkins* v. *Kemp*, 3 East, 410, 437; *Nicloson* v. *Wordsworth*, 2 Sw. 365, 369, 370; *Adams* v. *Taunton*, 5 Madd. 435.

(*c*) Sug. Pow. 49, 893; *West* v. *Berney*, 1 R. & M. 431, 434. A power simply collateral is a power by the exercise of which the donee can acquire no interest in the subject-matter of the power, given to a person who has not any interest therein at the time of the creation of the power and takes no interest therein under the instrument conferring the power; see Sug. Pow. 47, 48.

(*d*) Sug. Pow. 50.

(*e*) Sug. Pow. 50, 126; see above, pp. 262-264.

(*f*) Stat. 21 Hen. VIII. c. 4.

(*g*) Above, p. 263.

(*h*) *Keates* v. *Burton*, 14 Ves. 434; *A.-G.* v. *Fletcher*, 5 L. J. (N. S.) Ch. 75; see Farwell on Powers, 109-112, 3rd ed.

executor who proved might well do so (*i*). If trustees were invested with any power which it would be their duty to exercise, they could not release or contract not to exercise the same or otherwise divest themselves of their authority (*k*); and the above enactments have not altered the law in this respect (*l*).

Release of power, where a breach of trust.

The law as to the exercise by any new trustee duly appointed of a bare power given to any trustee or trustees is the same as governs the exercise by a new trustee of a power coupled with an interest (*m*). With respect to the exercise by any other person than a new trustee duly appointed of a bare power given to a trustee or trustees after the death of a sole or the last surviving trustee, there is, of course, no succession to any estate in the land, and at common law the power could only be exercised, if at all, by some person expressly designated for the purpose by the donor of the power, as where the executors or administrators of the last surviving trustee were mentioned among the persons to whom the power is given (*n*). But with regard to trusts constituted after or created by instruments coming into operation after the year 1881, we have seen that it is now enacted that, subject to any direction to the contrary expressed in the instrument creating the trust, the personal representatives of a sole or the last surviving or continuing trustee, shall be capable of exercising any power which was given to or capable of being exercised by such trustee, until the appointment of new trustees (*o*). This enactment appears to extend to the case of a bare power given to trustees.

Exercise of a bare power by new trustees.

By any others after the death of the original donees.

Capacity of personal representatives of sole or surviving trustee to exercise such powers.

In the case of a purchase from trustees exercising a power of sale, the conveyancer advising the purchaser must have regard to the provisions of the Settled Land Act, 1882 (*p*), which

Trustees exercising a power conferred by a settlement for some purpose provided for in the Settled Land Acts.

(*i*) *Crawford* v. *Forshaw*, 1891, 2 Ch. 261, 266, 267.

(*k*) *Weller* v. *Ker*, L. R. 1 Sc. App. 11; *Re Dunne's Trusts*, 1 L. R. Ir. 516; *Saul* v. *Pattinson*, 34 W. R. 561.

(*l*) *Re Eyre*, 49 L. T. N. S. 259.

(*m*) Above, p. 256; see *Hall* v. *Dewes*, Jac. 189.

(*n*) See above, pp. 262-264; Farwell on Powers, 512-514, 3rd ed.

(*o*) Stat. 1 & 2 Geo. V. c. 37, s. 8; above, pp. 257, 258.

(*p*) Stat. 45 & 46 Vict. c. 38, s. 56, sub-s. 2, enacting that in case of a conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts *or intends* to exercise any power under this Act, the provisions of this Act shall prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act.

make the consent of the tenant for life under a settlement necessary to the exercise by the trustees of the settlement or any other person of any power conferred by the settlement and exercisable for any purpose provided for in the Act. He must consider, therefore, whether the instrument conferring the power is, either alone or together with other instruments, a settlement within the meaning of the Act (*q*). And if it be, he should require the limitations of the beneficial interests under the settlement to be abstracted (if this has not been done) sufficiently to show whether there is a tenant for life, or a person having the powers of a tenant for life, entitled in possession under the settlement (*r*). And if the existence of any such person be disclosed, the conveyancer should require him to consent to the exercise of the power; for if such consent should not be obtained, any conveyance to him by the trustees in supposed pursuance of the authority conferred by the settlement would be void as an exercise of the power (*s*). The Act does not require the consent of the tenant for life to be given in writing, or make it necessary for him to concur in the conveyance exercising the power; so the purchaser cannot do more than call for evidence of such consent (*t*).

What are powers exercisable for some purpose provided for in the Act.

It will be observed that the only powers, to the exercise of which the consent of the tenant for life is so required, are those conferred by the settlement and exercisable for any purpose provided for in the Act. It must not be forgotten that in this context the expression "the settlement" means the settlement as defined in the Act, and therefore extends to any group of instruments forming what is termed a compound settlement (*u*). The purposes provided for in the Act are, of course, principally the sale of settled land and the application of the purchase-

(*q*) See stats. 45 & 46 Vict. c. 38, s. 2; 53 & 54 Vict. c. 69, s. 4; *Re Ailesbury and Iveagh*, 1893, 2 Ch. 345; *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275; *Talbot* v. *Scarisbrick*, 1908, 1 Ch. 812, 819, deciding that a private Act of Parliament, which simply conferred powers upon the trustees of a settled estate, but did not alter or affect the limitations of the property, was not one of the instruments constituting the settlement; and see next chapter.

(*r*) See stat. 45 & 46 Vict. c. 38, ss. 2 (5), (7), 58.

(*s*) See *Re Newcastle's Estates*, 24 Ch. D. 129, 139 *sq.*; *Re Clitheroe Estate*, 28 Ch. 378; 31 Ch. D. 135; *Re Atherton*, 1891, W. N. 85.

(*t*) See *Re Pope's Contract*, 1911, 2 Ch. 442, 447, and observe the evidence there furnished.

(*u*) See note (*q*), above.

money in manner therein provided, the exchange and partition of settled land and the leasing thereof for the terms specified in the Act (*x*); and any express powers conferred by the settlement for any of these purposes, upon any person or persons other than the tenant for life, are exercisable only with his consent. If, however, the settlor should have given to trustees larger powers over the settled land than are by the Act conferred upon the tenant for life, as if he should have authorized them to sell in consideration of the receipt of debentures of or shares in a company, or of the grant of a rentcharge, or to lease for longer terms than may be granted under the Act, these powers are perfectly valid (*y*); and it does not appear that they would be "exercisable for any purpose provided for in this Act" (*z*), so as to make the consent of the tenant for life necessary to their exercise (*a*). It has been suggested (*b*) that to the exercise of a power given to trustees for raising charges by mortgage or sale the consent of the tenant for life would not be necessary, on the ground that the trustees would have a title paramount to that of the tenant for life, and he could not prevent the raising of the charges. But with regard to a power conferred by the settlement to raise charges by sale, it must be remembered that the Settled Land Act, 1882 (*c*), authorizes the application of the proceeds of a sale of the settled land by the tenant for life under the power thereby conferred in the discharge of any incumbrances affecting the inheritance of the settled land or other the whole estate, which is the subject of the settlement. So that if the charges to be raised should come within the definition of such incumbrances, their raising by sale would appear to be a purpose provided for in the Act; and it is thought that in such case it would not be safe to rely on an exercise of the express power of sale without the tenant

(*x*) See stat. 45 & 46 Vict. c. 38, ss. 3, 6, 21.

(*y*) Stat. 45 & 46 Vict. c. 38, ss. 56 (1), 57; *Lonsdale* v. *Lowther*, 1900, 2 Ch. 687.

(*z*) See sect. 56 (2), above, p. 265, and n. (*p*).

(*a*) This statement assumes that by the exercise of the express power something will be done which the tenant for life could not do under his statutory power. But if by the exercise of a larger power than that conferred by the Act it were proposed to do something which could be done under the statutory power, as if under a power for trustees to grant building leases for any term not exceeding 120 years it were proposed to grant a building lease for 99 years on the same conditions as are authorized by the statutory power, the case is different; and the consent of the tenant for life would appear to be necessary.

(*b*) Wolstenholme's Conveyancing and Settled Land Acts, 387, 8th ed.

(*c*) Stat. 45 & 46 Vict. c. 38, s. 21 (ii).

for life's consent. As regards a power for trustees to raise charges by mortgage, a tenant for life, prior to the Settled Land Act, 1890, had no general power to mortgage the settled land in order to raise money to discharge some incumbrance affecting the same; so that raising charges by mortgage was not a purpose provided for by the Settled Land Act, 1882. The Act of 1890 (*d*), however, empowered the tenant for life to mortgage the settled land for the purpose of raising money to discharge an incumbrance thereon. And as this Act and the previous Settled Land Acts are to be read and construed together as one Act (*e*), it seems that the raising of money by mortgage to discharge incumbrances is now a purpose provided for in the Acts, and consequently that an express power for this purpose conferred on trustees by the settlement is no longer well exercisable without the consent of the tenant for life. Where the settlement contains, not a mere discretionary power, but an imperative trust exercisable for some purpose provided for in the Act, it appears that the consent of the tenant for life to the exercise of the trust is not required (*f*).

Where two or more persons together constitute the tenant for life.

By the Settled Land Act, 1884 (*g*), where two or more persons together constitute the tenant for life for the purposes of the Settled Land Act, 1882, then, notwithstanding anything contained in the above-cited provisions (*h*) of that Act requiring the consent of all those persons, the consent of only one of those persons is to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement and exercisable for any purpose provided for in that Act. By the Act of 1882 (*i*), if in any case there are two or more persons beneficially entitled to possession of settled land as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of that Act. In any such case, therefore, one only of such persons need now consent to the exercise by the trustees of the settlement, or any other person, of any power conferred by the settlement and exercisable for any purpose provided for in that Act (*k*). Where lands were given for the benefit of several persons in undivided shares,

(*d*) Stat. 53 & 54 Vict. c. 69, s. 11. (*e*) Sect. 2.
(*f*) See *Taylor* v. *Poncia*, 25 Ch. D. 646.
(*g*) Stat. 47 & 48 Vict. c. 18, s. 6 (2).
(*h*) Stat. 45 & 46 Vict. c. 38, s. 56 (2); above, p. 265, n. (*p*).
(*i*) Sect. 2 (5), (6).
(*k*) *Re Morris' Settled Estates*, 1920, 2 Ch. 227.

and some of the shares were given in fee and others limited to a donee for life with remainder over, and a power was given for trustees to sell the entirety of the premises, it was questionable whether the consent of the tenants for life of the settled shares was necessary to the exercise by the trustees of their power of sale over the entirety. For the power of sale conferred by the Settled Land Acts would embrace the settled shares only, and it was only as regards these shares that the land would be the subject of a settlement within the meaning of those Acts; so that the power to sell the entirety might be considered to be not a power conferred by the settlement and exercisable for a purpose provided for in the Acts, but a power altogether paramount to the settlement. But in a case (*l*) where a testator gave one-fifth part of his estate to each of his four daughters for life with remainder over, and gave the remaining fifth part to the children of a deceased daughter absolutely, and empowered trustees to sell the whole of his estate, Kekewich, J., held that there was a conflict between this express power of sale and the power of sale given by the Settled Land Acts, because the sale of the entirety would deprive the tenants for life of the settled shares of their statutory power to sell them; and that the consent of the tenants for life was therefore necessary to the exercise by the trustees of their express power of sale. And he further decided that the tenants for life of the four settled shares did not together constitute a tenant for life within the meaning of the Settled Land Act, 1882 (*m*), so as to enable the required consent to be given under the Act of 1884 (*n*) by one only of them. This decision, however, was overruled by the Court of Appeal in *Re Morris' Settled Estates* (*o*), where land was devised in several undivided shares, all of which were settled, and a power of sale of the entirety was given to trustees; and it was considered that the tenants for life were entitled for concurrent estates or interests within the meaning of sect. 2 (6) of the Settled Land Act, 1882, so that the consent of one only of them was necessary to the exercise by the trustees of their power of sale (*p*). And in that case Warrington, L. J., said (*q*) that he thought it was a matter for serious consideration whether there was any tenant for life

Re Osborne and Bright's, Ltd.

Re Morris' Settled Estates.

(*l*) *Re Osborne and Bright's, Ltd.*, 1902, 1 Ch. 335.
(*m*) Stat. 45 & 46 Vict. c. 38, s. 2 (5), (6).
(*n*) Stat. 47 & 48 Vict. c. 18, s. 6 (2).
(*o*) 1920, 2 Ch. 229.
(*p*) Above, p. 268.
(*q*) 1920, 2 Ch. 239.

at all of that over which the trustees had the power of sale, namely, the entirety; and he doubted whether there really was any conflict (*r*) between the trustees' power to sell the entirety and the statutory powers of the tenants for life to sell their respective undivided shares (*s*). This point has since been so decided (*t*).

Estate duty chargeable on land settled on trust for sale.

It must not be forgotten that, when land is settled either by deed or will on trust for sale and investment of the purchase-money for the benefit of various persons in succession, and the lands are not immediately sold, estate duty will become payable on the death of any one of those persons, and will, it appears, become a charge on the land. On a purchase, therefore, from the trustees for sale under such a settlement, the purchaser, if he have notice of the death on or after the 1st August, 1894, of any person so interested in the purchase-money, must see that all estate duty, which has become so charged on the land sold, has been or will be paid (*u*).

Sale of land purchased in breach of trust.

If trust money be improperly invested in the purchase of land, it is the duty of the trustee to realise the investment at the earliest favourable opportunity, and invest the proceeds in some manner authorized by the instrument which created the trust. The trustee is therefore empowered to sell the land, and can make a good title thereto and convey the same without the concurrence of the beneficiaries, notwithstanding that the purchaser have notice of the breach of trust; unless the beneficiaries, being all *sui juris*, have elected to take the land *in specie* (*v*).

Sale of land purchased under power to invest settled personalty in the purchase of land.

When the purchase of land is authorized as an investment of funds comprised in a settlement of personalty, it has been usual to provide that any land so purchased shall be held on trust for sale (*x*). But it has been decided that a power to invest settled personalty in the purchase of land implies a power of

(*r*) See above, pp. 265, n. (*p*), 269.

(*s*) The learned Lord Justice seems in fact to have concurred in the view propounded above, p. 269.

(*t*) *Re Hone and Parker's Contract*, 1922, W. N. 209.

(*u*) Stat. 57 & 58 Vict. c. 30, ss. 1, 2, 9 (1), 24; see below, Chap. XXI. § 3.

(*v*) *Re Patten and Edmonton Union*, 52 L. J. Ch. 787; *Power* v. *Banks*, 1901, 2 Ch. 487, 496; *Re Jenkins and Randall's Contract*, 1903, 2 Ch. 362; see above, p. 245; Dart, V. & P. 610-612, 5th ed.; 687-689, 6th ed.; 629-630, 7th ed.

(*x*) See Wms. Pers. Prop. 418-420, 646, 17th ed.

varying investments, and therefore a power to sell any land so purchased (*y*). And by the Conveyancing Act, 1911 (*z*), where a settlement of property as personal estate contains a power to invest money in the purchase of land, such land shall, unless the settlement otherwise provides, be held by the trustees on trust for sale, with power to postpone the sale. But this enactment applies only to settlements coming into operation on or after the 1st January, 1912 (*a*).

Trustees' receipts.

Modern statutes have in effect abolished the old rule of equity, that any person paying money or assigning other personal estate to a trustee thereof was bound to see that the same was duly applied pursuant to the trust, unless exempted from that obligation by the intention of the author of the trust, either expressly declared or implied from the nature of the trusts (*b*). Under the Trustee Act, 1893 (*c*), the receipt in writing of any trustee for any money, securities or other property or effects, payable, transferable or deliverable to him under any trust or power, is a sufficient discharge for the same, and effectually exonerates the person paying, transferring or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof. It may be noted that this enactment does not justify the payment of money or delivery of securities to one only of several trustees. In such a case the money must be paid or other property assigned over to all the trustees, who should all join in giving the receipt (*d*).

(*y*) *Re Pope's Contract,* 1911, 2 Ch. 442.

(*z*) Stat. 1 & 2 Geo. V. c. 37, s. 10, sub-s. 1.

(*a*) Sub-s. 2.

(*b*) *Lloyd* v. *Baldwin,* 1 Ves. sen. 173; Sug. V. & P. 657 *sq.*; Lewin on Trusts, 394 *sq.*, 6th ed.; 536 *sq.*, 12th ed.

(*c*) Stat. 56 & 57 Vict. c. 53, s. 20, replacing 44 & 45 Vict. c. 41, s. 36, and applying to trusts created either before or after the commencement of the Act. Also by stat. 22 & 23 Vict. c. 35, s. 23, the receipt of a trustee for any *purchase* or *mortgage money* payable to him is a good discharge, unless a contrary intention be expressly declared by the instrument creating the trust. Lord Cranworth's Act, stat. 23 & 24 Vict. c. 145, s. 29, provided that trustees' receipts should be good discharges for any *money* payable to them: but this provision applied only in the case of instruments executed on or after the 28th Aug. 1860, and was repealed by stat. 44 & 45 Vict. c. 41, s. 71. After the passing of Lord Cranworth's Act, however, the old practice of inserting in every instrument creating a trust a receipt clause, in terms similar to those of the present statutory provision, was discontinued; 3 Davidson, Prec. Conv. 222-226, 719, n., 3rd ed.

(*d*) *Hall* v. *Franck,* 11 Beav. 519; *Webb* v. *Ledsam,* 1 K. & J. 385; *Margetts* v. *Perks,* 12 W. R. 517; *Lee* v. *Sankey,* L. R. 15 Eq. 204; 3 Davidson, Prec. Conv. 223, n., 3rd ed.

Purchase by trustees.

According to the general rule of equity, trustees investing trust money in the purchase of lands were bound to see that they obtained a good marketable title (*e*). This rule, however, was not inflexible; it might be modified in its application according to the circumstances of particular cases. Thus if, considering the objects of the trust (such as the acquisition of land advantageous or convenient to be held with land already in settlement), the purchase were otherwise desirable, it appears that trustees would be justified in accepting a substantially safe holding title (*f*). And the rule has now been considerably relaxed by statute. Trustees purchasing land are expressly authorized to buy without excluding the application of the second section of the Vendor and Purchaser Act, 1874 (*g*). This exonerates trustees authorized to invest in the purchase of leasehold lands, held for a term of which less than forty years are unexpired, from the necessity of stipulating for the production of the lessor's title (*h*). Trustees are also specially protected in buying under the conditions imported into contracts for sale by the Conveyancing Act, 1881 (*i*), when the period, for which title is by law required to be shown, is not curtailed by special stipulation. And it is now provided by the Trustee Act, 1893 (*k*), that a trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted. The standard so set is that to which trustees are now obliged to conform (*l*); and they should be careful, in buying lands with trust money, not to bind themselves by any

(*e*) Lewin on Trusts, 437, 6th ed.; 586, 12th ed.; *Dance* v. *Goldingham*, L. R. 8 Ch. 902, 911; and see *Worman* v. *Worman*, 43 Ch. D. 296, 302-305, deciding that trustees for purchase ought not to buy an equity of redemption.

(*f*) 1 Dart, V. & P. 89, 90, 5th ed.; 99, 100, 6th ed.; 97, 98, 7th ed.

(*g*) Stat. 56 & 57 Vict. c. 53, s. 15, replacing 37 & 38 Vict. c. 78, s. 3; see above, pp. 40, 91, 92, 179. Trustees purchasing need not, of course, exclude the operation of the first section of the Vendor and Purchaser Act, 1874; for that section altered the rule of law, and made a forty years' title an equally good marketable title as a sixty years' title was previously; see above, pp. 91, 179.

(*h*) See above, p. 92.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 66; see above, pp. 40, 42, 92.

(*k*) Stat. 56 & 57 Vict. c. 53, s. 8 (3), replacing 51 & 52 Vict. c. 59, s. 4 (3).

(*l*) See *Re Theobald*, 19 Times L. R. 536.

condition of sale which will preclude them from requiring such a title as they ought to obtain. Trustees directed or empowered to purchase lands are frequently authorized by the express terms of the instrument creating the trust to purchase any hereditaments with less than a marketable title; but this scarcely allows them to adopt a lower standard than that now set by the Trustee Act, 1893 (*m*).

What kind of property should be bought by trustees for persons entitled successively.

Trustees authorized to purchase land to be held on trust for persons entitled in succession, as tenant for life and remainderman in fee, should take care that the property they buy is of a nature to confer upon all the persons so entitled their due share of the benefit to be derived from the purchase. Generally speaking, they should seek to obtain a property which will produce a fair immediate return in the way of income to the tenant for life, and is likely to continue to yield the same advantage to the remainderman after his death. They should avoid alike property which is wasting, or may be wasted, such as mines or timber, and property yielding no present profits, as a reversion or remainder to which no rent is incident, or an advowson (*n*). Even house property has been thought to be objectionable for purchase by trustees on the ground of its being liable to decay for want of repair and to destruction by fire (*o*). It has been held, however, that trustees authorized to invest in the purchase of "lands or hereditaments of an estate

(*m*) See Davidson, Prec. Conv. vol. iii. 250, 722, 3rd ed.; vol. iv. 55, 3rd ed.; 1 Dart, V. & P. 90, 5th ed.; 100, 6th ed.; 98, 7th ed.; 2 Key & Elph. Prec. Conv. 537, 4th ed.; 652, 10th ed. It may be mentioned here that trustees investing trust money on a mortgage of lands were bound equally as on a purchase to invest on the security of property with a good marketable title; and there were not the same reasons in the case of an investment on mortgage for relaxing the stringency of the rule. It has long been the regular conveyancing practice expressly to authorize trustees to dispense with the investigation of the lessor's title in lending money on the security of leasehold hereditaments or otherwise to lend on any security with less than a marketable title; see the authorities last cited. And now the above-quoted enactment (sect. 8 (3) of the Trustee Act, 1893) applies equally in the case of trustees lending money on the security of any property as in that of a purchase; and by sect. 8 (2) of the same Act a trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed wholly or partially with the production or investigation of the lessor's title.

What title trustees investing on mortgage should require.

(*n*) Lewin on Trusts, 438, 439, 6th ed.; 589, 590, 12th ed.

(*o*) Lewin on Trusts, 438, 6th ed.; 589, 12th ed.

in fee simple in possession" were entitled to buy lands subject to building leases for ninety-nine years (*p*). Each case must, of course, be considered with reference to the terms and object of the power given to purchase. Thus, where it is intended that a large estate shall be purchased and conveyed to the usual limitations of a strict settlement, it is certainly allowable to buy lands bearing a fair proportion of timber (*q*); and at the present time it seems equally permissible to purchase land containing mines and minerals, so long as the mineral wealth does not form too large a part of the value of the property, since the mines can be worked and the profits equitably distributed between tenant for life and remainderman under the powers given by the Settled Land Act, 1882 (*r*).

Valuation on behalf of trustees selling or purchasing.

Trustees selling land under a trust for or power of sale should, as a rule, obtain a valuation of the property from a competent professional surveyor acting for them independently and in nowise concerned on behalf of any purchaser, in order to guide them as to the sum to be accepted on a sale by private contract or to be fixed as the reserve price on a sale by auction. And trustees intending to purchase land should obtain similar advice with regard to the value of the land they propose to buy (*s*). But, of course, cases may occur in which trustees are practically safe in acting on their own judgment, as where obviously favourable terms are proposed to them. If all the *cestui-que-trusts* should be *sui juris*, and not too numerous, the best plan is to obtain their sanction as to the price to be taken, paid or fixed.

Title depending on past exercise of trust for or power of sale.

Where a title depends on the exercise in the past of a trust for or power of sale or purchase of land, the purchaser may assume, if nothing appear to the contrary, that the trust or power was duly exercised to the best advantage of the *cestui-que-trusts* as regards price or value and otherwise;

(*p*) *Re Peyton's Settlement Trust*, L. R. 7 Eq. 463; and see *Re Theobald*, 19 Times L. R. 536; *Wakefield and Barnsley Union Bank, Ltd.* v. *Yates*, 1914, 1 Ch. 452, 457, 460.

(*q*) Lewin on Trusts, 439, 6th ed.; 589, 12th ed.

(*r*) Stat. 45 & 46 Vict. c. 38, ss. 6, 9-11. See *Bellot* v. *Littler*, W. N. 1874, p. 156; 22 W. R. 836; 30 L. T. N. S. 861.

(*s*) Lewin on Trusts, 375, 376, 436, 6th ed.; 501, 585, 12th ed.; 1 Dart, V. & P. 79, 5th ed.; 90, 6th ed.; 89, 7th ed.; above, p. 248. As to the valuation which ought to be obtained by trustees proposing to invest trust money on a mortgage of lands, see stat. 56 & 57 Vict. c. 53, s. 8.

and he need not and should not make any inquiry or ask for any evidence as to this (*t*). But if it appear that the property was sold at an undervalue, or the trust or power was otherwise improperly exercised, the case is different and the title cannot safely be accepted (*u*).

(*t*) See *Borell* v. *Dann*, 2 Hare, 440, 449-452; *Ware* v. *Egmont*, 4 De G., M. & G. 460, 471-474; *Hurrell* v. *Littlejohn*, 1904, 1 Ch. 689; above, p. 108.

(*u*) See *A.-G.* v. *Pargeter*, 6 Beav. 150; *Ker* v. *Dungannon*, 1 Dru. & War. 509, 542; *Stevens* v. *Austen*, 3 E. & E. 685.

CHAPTER IX.

OF TITLE UNDER THE EXERCISE OF POWERS.

§ 1. Powers of appointment.
§ 2. Powers of sale under Settled Land Acts.
§ 3. Powers of sale under mortgages.

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§ 1.—*Powers of appointment.*

Title depending on exercise of a power of appointment.

Conditions prescribed for exercising the power must be strictly observed.

WHERE the title depends on the exercise of a power of appointment, it is the duty of the conveyancer advising the purchaser to ascertain that the power has been or will be in all respects well executed. The general rule is that in the exercise of a power *all* conditions prescribed in the instrument creating the power must be strictly observed; and in this respect no distinction is made between matters apparently substantial, such as the nature of the instrument by which the power is to be executed or the requirement of the consent of any person to its execution, and formalities like the number of witnesses by which the executing instrument is required to be attested (*a*). And the rule is that any instrument showing an intention to exercise the power, but not exactly complying with the terms and conditions imposed by the donor of the power, is void altogether as an exercise of the power (*b*). Under the Wills Act (*c*), how-

(*a*) *Hawkins* v. *Kemp,* 3 East, 410, 440; *Holmes* v. *Coghill,* 7 Ves. 499, 506; *Reid* v. *Shergold,* 10 Ves. 370; *Marjoribanks* v. *Hovenden,* 1 Drury, 11; Sug. Pow. 147 *sq.*, 3rd ed.; Farwell on Powers, 147 *sq.*, 3rd ed.; Wms. Real Prop. 417 *sq.*, 23rd ed.

(*b*) See previous note; *Barretto* v. *Young,* 1900, 2 Ch. 339. This rule is modified in equity, though not at law, by the equitable doctrines mentioned below as to aiding the defective execution of powers; and is further modified in the case of powers of leasing by the Leases Acts, 1849 and 1850 (stats. 12 & 13 Vict. c. 26; 13 & 14 Vict. c. 17), under which an attempted exercise of a power of leasing, which is invalid at law for want of strict compliance with the terms of the power, may be considered in equity as a contract for the grant of a valid lease under the power, and leases prematurely granted in exercise of a power are made valid if the lessor's estate endure until the time when the lease might have been well granted: Wms. Real Prop. 426, 427, 23rd ed.

(*c*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 10.

ever, wills executing powers *must* be executed and attested by two witnesses in the manner therein prescribed for the execution of all wills (*d*); but if so executed and attested, they operate as valid executions of the power, notwithstanding that the instrument creating the power may have required some additional or other form of execution or solemnity. And under Lord St. Leonards' Act (*e*) powers of appointment, exercisable by deed or by any instrument in writing not testamentary, may

Execution of power by will—

By deed.

(*d*) This rule must be strictly observed in the case of all wills exercising powers to dispose of land in England, leasehold as well as freehold or copyhold, whether the testator were domiciled in England or elsewhere; see *Murray* v. *Champernowne,* 1901, 2 Ir. 230; *Pepin* v. *Bruyère,* 1902, 1 Ch. 24; *Re Hoyles,* 1910, 2 Ch. 333, 341, affirmed, 1911, 1 Ch. 179; and also in the case of all wills exercising an English power to dispose of personal chattels, and made in England by persons domiciled in England (whether British subjects or aliens). By an English power is meant one created by an instrument intended to be construed according to English law and to confer a power exercisable according to the rules of English law. Wills exercising English powers to dispose of personal chattels are valid, as an exercise of the power, if executed in accordance with the requirements of the Wills Act, whatever be the testator's domicile and although (where he is domiciled out of England) the will is invalid by the law of the place of his domicile; *Murphy* v. *Deichler,* 1909, A. C. 446. But wills made by persons domiciled out of England (whether aliens or British subjects), exercising powers to dispose of personal chattels, complying with the formalities (if any) required by the terms of the power, and otherwise executed in accordance with the law of the place of the testator's domicile are valid, as an exercise of the power, although they do not comply with the requirements of the Wills Act; *D'Huart* v. *Harkness,* 34 Beav. 324; *Re Price,* 1900, 1 Ch. 442; *Barretto* v. *Young,* 1900, 2 Ch. 339; *Re Walker,* 1908, 1 Ch. 560; *Re Simpson,* 1916, 1 Ch. 502; *Re Wilkinson's Settlement,* 1917, 1 Ch. 620; *Re Lewal's Settlement Trusts,* 1918, 2 Ch. 391. Cf. and distinguish *Re D'Este's Settlement Trusts,* 1903, 1 Ch. 898; *Re Scholefield,* 1905, 2 Ch. 408, settled, 1907, 1 Ch. 664; these two cases were criticised in *Re Simpson* and *Re Wilkinson,* ubi sup., and not followed in *Re Lewal,* ubi sup. As to the wills of British subjects exercising a power over personal chattels and not complying with the Wills Act but admissible to probate as wills solely by virtue of Lord Kingsdown's Act (stat. 24 & 25 Vict. c. 114, s. 1), see *Re Kirwan's Trusts,* 25 Ch. D. 373; *Hummel* v. *Hummel,* 1898, 1 Ch. 642; *Re Price,* 1900, 1 Ch. 442, 448-450; *Re Wilkinson's Settlement,* 1917, 1 Ch. 620, 626, 627; Dicey, Conflict of Laws, 744-759, 3rd ed.; Farwell on Powers, 150 *sq.*, 3rd ed. It has been decided in Ireland that a power to dispose of the proceeds of sale of land settled on trust for sale is for the purposes of the doctrine here discussed a power to dispose of land; *Murray* v. *Champernowne,* ubi sup. But it seems questionable whether this is correct, as an interest in the proceeds of sale of land settled on trust for sale is for all other purposes treated in English law as personalty; see *Forbes* v. *Steven,* L. R. 10 Eq. 178; *A.-G.* v. *Hubbuck,* 13 Q. B. D. 275; *A.-G.* v. *Johnson,* 1907, 2 K. B. 885. The same remark is applicable to a beneficial interest in a definite sum of money directed to be raised out of land, such as a portion.

Wills made in exercise of powers by persons domiciled out of England.

(*e*) Stat. 22 & 23 Vict. c. 35, s. 12, passed 13th Aug. 1859.

be well exercised, subsequently to the Act, by a deed executed in the presence of and attested by two or more witnesses, in the manner in which deeds are ordinarily executed and attested, although the instrument creating the power may have required some additional or other form of execution or attestation, or solemnity. It will be observed that, where a power is required to be executed by a deed or writing attested by two witnesses, it is not well executed by a deed attested by one witness only or unattested (*f*). Such a defect of execution is not aided by Lord St. Leonards' Act. And it is expressly provided (*g*) that this statutory provision shall not operate to defeat any direction in the instrument creating the power that the consent of any person shall be necessary to a valid execution, or that any act shall be performed, in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and that nothing contained in the Act shall prevent the donee of a power from exercising it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed (*h*).

Equitable relief against defective execution of a power.

Equity will aid the defective execution of a power, if the intended appointee be a purchaser from or the wife or a child or a creditor of the person intending to exercise the power, or if the appointment be for a charitable purpose (*i*); and this relief is granted, notwithstanding that the person entitled in default of appointment was a purchaser, and even against a purchaser from him, of the estate limited in default of appointment (*k*). But such relief is only afforded to cure defects which are not of the essence of the power, such as the want of a seal or of the proper number of witnesses, or execution by will of a power to appoint by deed (*l*). And equity will not uphold an act which will defeat what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention (*m*). No relief will therefore be given

(*f*) Sug. Pow. 207, 8th ed.
(*g*) Stat. 22 & 23 Vict. c. 35, s. 12.
(*h*) Ibid.
(*i*) Sug. Pow. 533-536, 8th ed.; Farwell on Powers, 375, 3rd ed.; and see *Charlton* v. *Charlton*, 1906, 2 Ch. 523.
(*k*) Sug. Pow. 542, 8th ed.
(*l*) Sug. Pow. 548 *sq.*, 558, 559, 560, 8th ed.; Farwell on Powers, 380, 3rd ed.
(*m*) Rolt, L. J., *Cooper* v. *Martin*, L. R. 3 Ch. 47, 58; Sug. Pow. 560, 8th ed.

against the exercise by deed of a power to appoint by will (*n*), or against the exercise by will of a power to appoint by deed to be executed before a specified event, which happened in the lifetime of the person purporting to appoint by will (*o*). It must not be forgotten that where a power to appoint the legal estate in lands is exercised defectively, but so that equity will grant relief against the defective execution, the legal estate remains outstanding in the person entitled in default of appointment, and must be got in if it be desired to make title under the appointment (*p*).

Title under a special power of appointment.

Where a title depends on the valid exercise of a special power of appointment, such as a power to appoint amongst a limited class of persons (the appointor's children, for instance), the conveyancer must, of course, see that the appointment is made in favour of those persons who are objects of the power (*q*), or some or one of them (*r*). And he must further ascertain that the appointment does not transgress the rules of equity with respect to the fraudulent execution of such powers; as where an appointment is made ostensibly for the benefit of some object of the power but with the real design of effecting some other purpose than that contemplated by the power (*s*). Where these rules are transgressed, it must be remembered that the appointment, if of the legal estate in lands, may be void in equity only, but not at law (*t*); so that where a title depends on the avoidance of such an appointment, the legal estate may have to be got in from the appointee. Another point to be borne in mind in considering the exercise of powers of appointment amongst a limited class of persons is the question whether the appointment infringes any of the established rules with respect to remoteness of limitation. In such cases, the validity of the estates limited by the instrument exercising the power depends on the result of the inquiry whether they would have been valid

Fraudulent execution.

Remoteness of limitation.

(*n*) *Reid* v. *Shergold,* 10 Ves. 370.
(*o*) *Cooper* v. *Martin,* L. R. 3 Ch. 47, 58.
(*p*) Sug. Pow. 532, 8th ed.; Farwell on Powers, 375, 3rd ed.
(*q*) See Sug. Pow. 498 *sq.*, 652 *sq.*, 664 *sq.*, 8th ed.; Farwell on Powers, 343 *sq.*, 549 *sq.*, 3rd ed.
(*r*) As to exclusive appointments, see Farwell on Powers, 414 *sq.*, 3rd ed.; Wms. Pers. Prop. 408, 17th ed.
(*s*) See Sug. Pow. 606 *sq.*, 8th ed.; Farwell on Powers, 457 *sq.*, 3rd ed.; *Cochrane* v. *Cochrane,* 1922, 2 Ch. 230.
(*t*) See Sug. Pow. 606—608, 8th ed.; *Cloutte* v. *Storey,* 1911, 1 Ch. 18, 30 *sq.*

Exercise of powers to appoint land amongst unborn *issue*.

if inserted in the instrument which created the power. And in investigating this point, the conveyancer must not forget that, as the law now stands, powers given by a marriage settlement or any other instrument to appoint estates in land amongst the *issue* of the marriage or of some specified living person, cannot well be exercised in such a way that the unborn child of a child unborn when the instrument took effect shall take either a legal or an equitable estate in remainder expectant on a life estate appointed to his or her parent (*u*); or so that a legal or an equitable estate appointed in remainder after a life estate appointed to some such unborn child shall be such as need not necessarily vest (if at all) within the period allowed by the rule against perpetuities (*x*); or so that any future estate or interest, whether legal or equitable, appointed to arise, in favour of any child or issue unborn when the instrument took effect, by way of shifting use or other executory limitation (and not by way of remainder) shall be such as contravenes the rule against perpetuities (*y*).

Attestation clause to instruments exercising powers.

Where an instrument creating a power of appointment has required that certain acts done in connection with the exercise of the power (such as the signing, sealing and delivery of a deed or writing) shall be attested by witnesses, the attestation clause of the instrument exercising the power should be examined with special care, as the omission to express therein that some or one of such required acts has been duly attested may vitiate the exercise of the power. On this subject the late Lord Justice Farwell (*z*) laid down the following rule as the result of the authorities:—"If a power requires two or more formalities to be attested, and the attestation clause expressly certifies that one of such formalities has been performed, then the power is not well executed (*a*). But if the attestation, although a

(*u*) *Whitby* v. *Mitchell*, 44 Ch. D. 85; *Re Nash*, 1910, 1 Ch. 1; cf. *Re Bullock's Will Trusts*, 1915, 1 Ch. 493; *Re Clarke's Settlement Trust*, 1916, 1 Ch. 467; *Re Garnham*, 1916, 2 Ch. 413.

(*x*) *Re Frost*, 43 Ch. D. 246, followed in *Re Ashforth*, 1905, 1 Ch. 535 (as to which case, see the late Mr. Charles Sweet's criticism in 49 Sol. J. 793, which it is respectfully submitted is well founded); *Whitby* v. *Von Luedecke*, 1906, 1 Ch. 783.

(*y*) See Wms. Real Prop. 391-397, 439-454, 23rd ed.; and the author's articles on Contingent Remainders and the Rule against Perpetuities in the Encyclopædia of English Law, 2nd ed.

(*z*) Farwell on Powers, 156, 157, 3rd ed.

(*a*) *Vincent* v. *Bishop of Sodor and Man*, 4 De G. & Sm. 294, 307; 5 Ex. 683, 694. In *Wright* v. *Wakeford*, 17 Ves. 454, 4 Taunt. 213,

limited and special one, is of such a nature that it must necessarily be inferred that the other requisites were complied with (*b*), or if the attestation is general, then the execution is valid, unless the contrary is shown" (*c*). This rule is, of course, subject to the above-mentioned provisions of the Wills Act and Lord St. Leonards' Act (*d*), which have greatly diminished its importance in practice.

Inquiry whether a power mentioned in the abstract has been exercised.

It may be noted here that, whenever an abstract of title mentions some express power of which the exercise might affect the property sold, but no exercise thereof is subsequently stated in the abstract (*e*), the purchaser's advisers should inquire whether the power has been exercised.

§ 2.—*Powers of sale under Settled Land Acts.*

Sale under statutory power.

When property is sold or conveyed in the exercise of a power created by statute, there is the same necessity for exact compliance with all the terms and conditions of the power as exists in the case of a power created by the act of parties (*f*); and in default of such compliance any instrument purporting to

where a power of consent to a sale was required to be exercised by writing under hand and seal *attested* by two or more credible witnesses, and the attestation clause of the deed exercising the power only certified that it was sealed and delivered in the presence of two witnesses, it was held that the power was not well executed. The like defect in instruments exercising powers executed before the 30th July, 1814, was cured by stat. 54 Geo. III. c. 168: but this Act had no prospective operation.

(*b*) See *Vincent* v. *Bishop of Sodor and Man*, 4 De G. & Sm. 294; 5 Ex. 683, where a power required to be exercised by will signed and published in the presence of and attested by two or more witnesses was held to be well executed by a will purporting to be signed and sealed in the presence of two witnesses, on the ground that sealing in the presence of witnesses must naturally and reasonably be considered to be a publication of the will; *Smith* v. *Adkins*, L. R. 14 Eq. 402, where a power to be exercised by any instrument in writing signed, sealed and delivered in the presence of two or more witnesses was held to be well executed by a will stated in the attestation clause to be signed, sealed, published and acknowledged to be the last will of the donee of the power; this was on the ground that publication of a will is equivalent to delivery thereof.

(*c*) See *Burdett* v. *Doe* d. *Spilsbury*, 10 Cl. & Fin. 340, where a power to be exercised by will signed, sealed and published in the presence of and attested by three witnesses was held to be well executed by a signed and sealed will with this attestation clause, "Witness, Charles Ball, Eliz. Ball, Ann Ball."

(*d*) Above, pp. 277, 278.

(*e*) Above, p. 104.

(*f*) Above, p. 276.

Sales under the Settled Land Acts.

exercise the power is, as a rule, void (*g*). At the present time the most important statutory power of sale is that given by the Settled Land Acts, 1882 to 1890. When title is made by means of the exercise of this power of sale, the points to which the attention of the purchaser's counsel should be principally directed are the following:—In the first place he must ascertain that the property so conveyed or to be conveyed is settled land (*h*), and that the person who has exercised or is to exercise the power is a tenant for life or a person having the powers of a tenant for life within the meaning of the Acts (*i*). He must next inquire whether such property comprises the principal mansion-house on the settled land and the pleasure grounds and park and lands usually occupied therewith or any part of the same, and if so, he must see that the assurance of that part of the property was or shall be made with the consent of the trustees of the settlement or under an order of the Court as required by the Settled Land Act, 1890 (*k*). Thirdly, he must assure himself that the purchase money was or shall be paid to duly constituted trustees of the settlement for the purposes of the Acts (*l*), or into Court (*m*). This is essential to the valid

(*g*) *Davies* v. *Davies,* 38 Ch. D. 499; *Mogridge* v. *Clapp,* 1892, 3 Ch. 382, 398; *Sutherland* v. *Sutherland,* 1893, 3 Ch. 169; *Chandler* v. *Bradley,* 1897, 1 Ch. 315; *Re Handman and Wilcox's Contract,* 1902, 1 Ch. 599; *Boyce* v. *Edbrooke,* 1902, 1 Ch. 836. The Leases Acts, 1849 and 1850, apply to an intended exercise of a statutory as well as to an express power of leasing; see above, p. 276, n. (*b*).

(*h*) See stat. 45 & 46 Vict. c. 38, ss. 2 (1—4, 10), 3. By s. 2, sub-s. 10 (i), in this Act land includes incorporeal hereditaments, also an undivided share in land. In *Re Brotherton's Estate,* 1908, W. N. 56, 98 L. T. 547, it was considered by the C. A. that an easement incident to settled land, as the dominant tenement, and exercisable over other land might well be sold under the Settled Land Acts to the owners of the servient tenement; although the Court appeared to entertain a doubt (which it is respectfully submitted was not well founded) whether such an easement could be exchanged under the Acts for another easement, which the owners of the before mentioned servient tenement were entitled to exercise over the settled land. See Shep. Touch. 292, that a right of way may be the object of an exchange; 24 L. Q. R. 260, and n. (3), 262—265.

Sale and exchange of settled easement.

(*i*) See stat. 45 & 46 Vict. c. 38, ss. 2 (5—7), 58.

(*k*) Stat. 53 & 54 Vict. c. 69, s. 10, replacing 45 & 46 Vict. c. 38, s. 15; see *Pease* v. *Courtney,* 1904, 2 Ch. 503; *Gilbey* v. *Rush,* 1906, 1 Ch. 11; *Re Wythes' Settled Estates,* 1908, 1 Ch. 593. For the principles by which the Court is guided in exercising the jurisdiction so conferred, see *Re Ailesbury's Settled Estates,* 1892, 1 Ch. 506; *Bruce* v. *Ailesbury,* 1892, A. C. 356.

(*l*) See stats. 45 & 46 Vict. c. 38, ss. 2 (8), 38—40; 53 & 54 Vict. c. 69, s. 16. As to where the Public Trustee is trustee for these purposes, see *Re Leslie's Hassop Estates,* 1911, 1 Ch. 611; *Re Moxon,* 1916, 2 Ch. 595.

Public Trustee.

(*m*) Stat. 45 & 46 Vict. c. 38, s. 22 (1).

exercise of the power of sale given by the Acts; and even where the settled land is subject to some incumbrance, which is prior to the settlement, and of which the amount exceeds the whole price, the purchase money cannot properly be paid to the incumbrancer on a sale under the Acts unless the trustees concur in the conveyance to direct such payment (*n*). Fourthly, he must be satisfied that all the estate, to which title is alleged or required to be made under this statutory power, has been or will be duly assured by the exercise of the statutory power of conveyance (*o*) by the tenant for life, either alone or with the concurrence of all other necessary parties, if any. He must also see that there is nothing in the whole transaction carried out by exercising the statutory power which is inconsistent with the duty of the tenant for life, in exercising the statutory power, as trustee for all parties entitled under the settlement (*p*). As is well known, a tenant for life intending to exercise the statutory power is required to give one month's previous notice of his intention to the trustees of the settlement (*q*), but a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of the notice so required (*r*). It is therefore unnecessary, when title is alleged or promised under an exercise of the statutory power, to make any inquiry whether notice has been duly given to the trustees. And it is improper to make any such inquiry; for if the purchaser ask this question and be informed in answer of facts disclosing some irregularity, he may lose the benefit of the protection undoubtedly afforded to those who abstain from inquiry (*s*). It has been held that it is not a condition precedent to making a valid contract for sale under the Settled Land Acts that the tenant for life should give notice of his intention to the trustees; he can enter into a binding contract for sale without giving any such notice (*t*), even though there be no trustees of the settlement in existence (*u*); and it will be sufficient to give the purchaser a good

As to giving notice of an intended sale.

(*n*) *Re Norton and Las Casas' Contract,* 1909, 2 Ch. 59.
(*o*) Stat. 45 & 46 Vict. c. 38, s. 20.
(*p*) See stat. 45 & 46 Vict. c. 38, s. 53; *Sutherland* v. *Sutherland,* 1893, 3 Ch. 169; *Chandler* v. *Bradley,* 1897, 1 Ch. 315; *Re Handman and Wilcox's Contract,* 1902, 1 Ch. 599.
(*q*) Stats. 45 & 46 Vict. c. 38, s. 45; 47 & 48 Vict. c. 18, s. 5.
(*r*) Stat. 45 & 46 Vict. c. 38, s. 45 (3).
(*s*) See *Marlborough* v. *Sartoris,* 32 Ch. D. 616, 623; *Hatten* v. *Russell,* 38 Ch. D. 334, 344.
(*t*) *Marlborough* v. *Sartoris,* 32 Ch. D. 616.
(*u*) *Hatten* v. *Russell,* 38 Ch. D. 334.

As to whether there are trustees of the settlement at the time of the completion of the sale.

title if trustees be duly appointed before the contract is completed (*v*). But although the purchaser is not concerned to inquire whether notice of the intention to sell were given to the trustees, he is not equally unconcerned with the question, whether there are any trustees of the settlement in existence at the time when the statutory power is completely exercised by conveyance. The Act provides that capital money arising from a sale made thereunder shall be paid either to the trustees of the settlement or into Court, at the option of the tenant for life (*w*); and it is held that the existence of such trustees is a condition precedent to the exercise of this option (*x*). Consequently, a vendor selling under the Settled Land Acts cannot make a good title, where there are no trustees of the settlement for the purposes of the Acts and the purchaser has notice of this fact, by requiring the purchase money to be paid into Court and conveying in consideration of such payment (*y*); but trustees must first be duly appointed, and then the sale can be completed. It appears, however, that if the purchaser, supposing that there are trustees of the settlement in existence and in ignorance that there are not, pay the purchase money into Court in good faith at the vendor's request, he will obtain a good title by a conveyance in consideration of such payment (*z*). It seems therefore that, if on a sale under the Settled Land Acts it appear from the abstract that trustees of the settlement were duly constituted or appointed, a purchaser directed to pay his purchase money into Court need not inquire whether such trustees still remain in existence. But if it appear from the abstract that there are no such trustees in existence, then the purchaser must require trustees for the purposes of the Acts to be appointed, and cannot safely pay the money into Court and accept a conveyance accordingly, without first seeing that such appointment has been duly made. Where the vendor's title depends on a former exercise of the power of sale given by the Settled Land Acts whereon the purchase money was paid into Court, and it appears from the abstract that there were no trustees of the settlement in existence at the time when the power was exercised

(*v*) *Hatten* v. *Russell,* 38 Ch. D. 334.
(*w*) Stat. 45 & 46 Vict. c. 38, s. 22 (1).
(*x*) *Hatten* v. *Russell,* 38 Ch. D. 334, 345; *Re Fisher and Grazebrook's Contract,* 1898, 2 Ch. 660.
(*y*) *Re Fisher and Grazebrook's Contract,* 1898, 2 Ch. 660; and see *Hughes* v. *Fanagan,* 30 L. R. Ir. 111.
(*z*) *Re Fisher and Grazebrook's Contract,* 1898, 2 Ch. 662.

by conveyance, the purchaser should, it seems, take the objection that the power was not well exercised unless there were such trustees in existence at that time, and should require proof of their existence to be furnished accordingly. If, however, such proof cannot be furnished, it will have to be considered whether a good title can be made on the ground that the purchaser from the tenant for life, supposing that there were such trustees, bought in good faith in ignorance of the fact that there were none (*a*). It has been held in the case of a building lease made by a tenant for life under the Settled Land Acts in the absence of any trustees, where no capital money was payable on granting the lease, that the existence of trustees of the settlement was not a condition precedent to the validity of the lease, and that a purchaser from the lessee must presume, in the absence of evidence to the contrary, that the lessee acted in good faith and had no notice of the irregularity (*b*). But in such a case, the only necessity for trustees is that due notice of the intention to lease may be given to them; and lessees and purchasers are expressly exonerated from the obligation of inquiring as to the giving of such notice (*c*). Where, however, any capital money has to be paid by a lessee or purchaser, the case is different (*d*); and there is not the same statutory absolution from the duty of inquiring into the existence of trustees. But even on a sale of settled land, the trustees have no active duty to perform, if the tenant for life desire that the purchase money shall be paid into Court. And as it is provided that a purchaser dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have complied with all the requisitions of the Act (*e*), and it is presumed generally that everything is rightly done until the contrary be shown (*f*), it seems that in this case also it would be presumed that the purchaser from the tenant for life acted in good faith without notice of the irregularity (*g*); and if nothing appeared to rebut this presumption, the title would be unimpeachable.

(*a*) Cf. *Re Handman and Wilcox's Contract,* 1902, 1 Ch. 599.
(*b*) *Mogridge* v. *Clapp,* 1892, 3 Ch. 382.
(*c*) Above, p. 283.
(*d*) *Mogridge* v. *Clapp,* 1892, 3 Ch. 400.
(*e*) Stat. 45 & 46 Vict. c. 38, s. 54.
(*f*) Above, p. 108.
(*g*) See *Mogridge* v. *Clapp,* 1892, 3 Ch. 382.

Who are trustees for the purposes of the Settled Land Acts.

In ascertaining who are the trustees for the purposes of the Settled Land Acts of any given settlement, it should be borne in mind that such trustees must be either—(1) the persons who are for the time being trustees under the settlement with power of sale of the settled land, or with power of consent to or approval of the exercise of such a power of sale (*h*); or (2) if there be no such trustees, the persons declared by the settlement to be trustees thereof for the purposes of the Acts (*i*); or (3) the persons appointed by the Court to be trustees under the settlement for the purposes of the Acts (*k*); or (4) if there be no trustees for the purposes of the Acts of any of the above-mentioned three classes, then the persons (if any) who are for the time being under the settlement trustees with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale (*l*); or (5) if there be no such persons as are

(*h*) The power of sale must be general, and not for a particular purpose only: *Re Coull's Settled Estates,* 1905, 1 Ch. 712, 724. It is important to observe that trustees of a settlement, who have no such power of sale, consent or approval as above mentioned, are not trustees thereof for the purposes of the Acts unless they come within classes (4) or (5) introduced by the amending Act of 1890; see *Wheelwright* v. *Walker,* 23 Ch. D. 752, 761; *Re Morgan,* 24 Ch. D. 114; *Re Carne's Settled Estates,* 1899, 1 Ch. 324; *Re Coull's Settled Estates,* ubi sup. But trustees with a power of sale exercisable with the consent of the tenant for life are trustees for the purposes of the Acts; *Constable* v. *Constable,* 32 Ch. D. 233.

(*i*) Stat. 45 & 46 Vict. c. 38, s. 2 (8). It should be noted that it is not only the settlor who can so appoint trustees for the purposes of the Act, but the persons for the time being entitled under the settlement, if they are all *sui juris* and absolutely entitled and concur in the appointment, can appoint such trustees as well; *Re Spearman Settled Estates,* 1906, 2 Ch. 502. When land is conveyed to the uses and subject to the provisions of some existing instrument or instruments of settlement, of or under which there are trustees duly appointed for the purposes of the Settled Land Acts, such trustees are the trustees for the purposes of those Acts of the settlement of the land so conveyed; see *Re Arran and Knowlesden and Creer's Contract,* 1912, 2 Ch. 141, deciding that, where trustees for the purposes of the Settled Land Acts had been appointed by the Irish Court of a compound settlement of land in Ireland, and land in England was subsequently conveyed to the uses and subject to the provisions to and subject to which the Irish land then stood limited under or by virtue of such compound settlement, the trustees so appointed were also the trustees for the purposes of those Acts of the compound settlement as regards the land in England so conveyed. As to the other point decided in this case, see above, p. 104, n. (*l*), and the author's criticism in 63 Sol. J. 406.

(*k*) Sect. 38.

(*l*) See *Re Moore,* 1906, 1 Ch. 789.

fourthly described, then the persons who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, whether the power or trust take effect in all events or not (*m*). Each of these classes must be taken to include any trustees or trustee duly appointed under an express or statutory power to appoint new trustees as well as the trustees originally appointed. It has been expressly provided that the statutory power of appointing new trustees shall apply to trustees for the purposes of the Settled Land Acts, whether appointed by the Court or by or under the settlement (*n*).

Deposit on sale by auction of settled land.

As above stated (*o*), it is usual on sales by auction to stipulate for payment of a deposit to the auctioneer or the vendor's solicitors. If the sale be made by a tenant for life selling under the Settled Land Acts, the purchaser must see that the deposit is duly paid to the trustees of the settlement for the purposes of the Acts, or into Court, as the vendor may require, before he accepts a conveyance and pays the balance of his purchase money. Otherwise he cannot be assured that he is obtaining a valid conveyance; for unless the whole of the purchase money be paid to the trustees or into Court, as required by the Acts, the statutory power of sale is not well executed (*p*). If the deposit be forfeited for the purchaser's default, the amount so obtained is capital money arising under the Settled Land Acts, and does not belong to the tenant for life as a casual profit (*q*).

Forfeiture of deposit.

As to the power of conveyance under the Settled Land Acts.

With regard to the question, whether all the estate, to which title is alleged or required to be made, has been or will be sufficiently assured by the exercise of the statutory power of con-

(*m*) Stat. 53 & 54 Vict. c. 69, s. 16. As to cases affected by this amendment of the law, see *Re Brown's Will*, 27 Ch. D. 179; *Wheelwright* v. *Walker*, 23 Ch. D. 752, 761; *Re Horne's Settled Estate*, 39 Ch. D. 84. When lands are limited to trustees in fee in trust for one of them for life and after his death on trust for sale or for others with power of sale, it has been held that all the trustees, including the tenant for life, are the trustees for the purposes of the Settled Land Acts; *Re Jackson's Settled Estate*, 1902, 1 Ch. 258.

(*n*) Stat. 56 & 57 Vict. c. 53, s. 47, replacing 53 & 54 Vict. c. 69, s. 17, passed to amend the law laid down in *Re Wilcock*, 34 Ch. D. 508.

(*o*) Above, p. 52.

(*p*) Above, pp. 281-283.

(*q*) *Re Foster's Settled Estates*, 1922, 1 Ch. 348.

veyance (*r*), the Settled Land Act, 1882 (*s*), empowers the tenant for life to convey by deed any land sold under the power of sale conferred by the Act for the estate or interest which is the subject of the settlement, and provides that such a deed shall be effectual to pass the land conveyed discharged from all the limitations, powers and provisions of the settlement, and from all estates, interests and charges subsisting thereunder, but *subject to and with the exception of*—(i.) All estates, interests and charges having priority to the settlement; and (ii.) all such other (if any) estates, interests and charges as have been conveyed or created for securing money actually raised at the date of the deed; and (iii.) all leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

What is "the settlement."

The Act contains (*t*) a very wide definition of the term *settlement*, extending it to any instrument or any number of instruments under or by virtue of which any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession. And this definition has received a liberal interpretation. Thus, in *Re Ailesbury and Iveagh* (*u*), lands had been limited by deeds dated in 1796 and 1826 to such uses as Charles and George should jointly appoint, and in default to the use of Charles for life with powers of jointuring a future wife; and Charles appointed a jointure rentcharge to Maria. Then by a deed of 1837 the lands were limited in exercise of the joint power of appointment, subject to the rentcharge, to the use of Charles for life, remainder to George for life, remainder to Ernest for life, remainder to Ernest's first son in tail male. In 1863, the estate tail so given

Re Ailesbury and Iveagh.

(*r*) Above, p. 283.

(*s*) Stat. 45 & 46 Vict. c. 38, s. 20. Exactly the same power of conveyance is given in the same section with regard to land exchanged, partitioned, leased, mortgaged or charged in exercise of the powers conferred by the Act, and also with regard to easements or other rights or privileges sold or leased under the same powers.

(*t*) Stat. 45 & 46 Vict. c. 38, s. 2 (1).

(*u*) 1893, 2 Ch. 345.

to Ernest's first son was barred and the lands were re-settled to the use of Ernest for life, remainder to his eldest son George John for life, remainder to uses for securing a jointure rentcharge to Evelyn, the son's wife, remainder to George John's first son in tail male. George John died leaving Thomas his eldest son, and in 1885 Thomas's estate tail was barred and the lands were re-settled to the use of Ernest for life in restoration of his former estate, remainder to Thomas for life. Ernest died, and Thomas sold the lands under the Settled Land Acts to Lord Iveagh. And it was held by Stirling, J., that the series of instruments constituting the settlement for the purposes of the Acts comprised not only the deeds of settlement of 1885 and 1863 taken together, but also those of 1837, 1826 and 1796, and consequently that Thomas was empowered to convey the lands sold discharged from Maria's as well as from Evelyn's rentcharge. This decision at first met with adverse criticism (*x*), but it was approved by the Court of Appeal in the case of *Re Mundy and Roper's Contract* (*y*). In that case lands were limited in 1861 to the use of John for life, remainder to uses for securing a jointure rentcharge to Elizabeth, remainder to trustees for the term of one thousand years from John's death on trust to raise portions for his younger children, remainder to Francis for life, with powers of jointuring and charging portions for younger children and limiting a term to secure such portions, remainder to Francis's first son in tail male. In 1865 Francis appointed a jointure rentcharge to Louisa his wife, charged the lands with portions for his younger children, and limited a term of 1,500 years to secure such portions. John died, and in 1889 Francis and his eldest son disentailed, and the lands were re-settled with the concurrence of John's younger children, who released their portions, to the use that Francis might charge the lands with 5,000*l*., remainder to uses for securing rentcharges to Millicent and Sophy (two of John's younger children) and Francis's eldest son, remainder to Francis for life without expressing that this should be in restoration of his former estate. Francis then sold the lands under the Settled Land Acts, and the purchaser objected that his life estate under the settlement of 1861 was

Re Mundy and Roper's Contract.

(*x*) 37 Sol. J. 336; Wolstenholme's Conveyancing and Settled Land Acts, 289, 7th ed.

(*y*) 1899, 1 Ch. 275.

not kept alive, and that he could not convey the lands discharged from his wife's jointure or his younger children's portions. It was held, however, by the Court of Appeal, that the deeds of 1861, 1865 and 1889 together constituted the settlement within the meaning of the Settled Land Acts, and that the tenant for life was accordingly empowered to convey the settled lands discharged from his wife Louisa's jointure and his younger children's portions charged in 1865 under the powers given by the deed of 1861; and it was considered that this result was in accordance with the intention of the Acts, and that it was immaterial that Francis's life estate under the deed of 1861 was not expressed to be restored to him by the re-settlement of 1889. These cases establish that when lands have been limited to various beneficiaries successively by a series of family settlements or re-settlements, and there is still subsisting in the lands any estate or interest (though it be no more than a rent-charge or a charge of portions) limited to a beneficiary by any deed of settlement earlier than that which conferred the estate of the tenant for life, then these deeds of settlement together constitute a settlement for the purposes of the Settled Land Acts, and the tenant for life can sell and convey the settled lands free from the estates or interests limited to beneficiaries by any of the earlier deeds (*z*). The term *beneficiaries* is here applied to persons taking some estate or interest by way of settlement, that is to say, in consideration of marriage or natural affection or of effecting a family settlement or re-settlement; the rule does not extend to estates created by way of mortgage, or, apparently, on a sale in the strict sense of the word (*a*). The definition of the settlement has been further extended by the Settled Land Act, 1890 (*b*), providing that every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement, is to be deemed one of the instruments

Assignments of or charges on the life estate in consideration of marriage or by way of family arrangement.

(*z*) See also *Re Wimborne and Browne's Contract*, 1904, 1 Ch. 537; *Re Phillimore's Estate*, 1904, 2 Ch. 430; *Re Marshall's Settlement*, 1905, 2 Ch. 325; *Re Trafford's Settled Estates*, 1915, 1 Ch. 9; *Re Monckton's Settlement*, 1917, 1 Ch. 224.

(*a*) Above, pp. 1, 251.

(*b*) Stat. 53 & 54 Vict. c. 69, s. 4, which is to apply and have effect with respect to every disposition before as well as after the passing of that Act, unless inconsistent with the nature or terms of the disposition.

creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of sect. 50 of the Act of 1882 (*c*).

The compound settlement.

When, however, a settlement for the purposes of the Settled Land Acts was first held to be constituted by a series of deeds of family settlement, the question arose, who could be the trustees of such settlement; for any trustees appointed by any of the deeds were only trustees of the family settlement made by that deed. The difficulty was solved by the appointment by the Court of trustees for the purposes of the Acts of the compound settlement (as it was called) constituted by the series of family settlements (*d*). It is accordingly necessary, whenever title is made through an exercise of the statutory power of sale by a tenant for life under such a compound settlement, for the purchaser's counsel to satisfy himself that the persons who are alleged to be the trustees of the settlement are the duly constituted trustees of the compound settlement (*e*).

Trustees of the compound settlement.

Sale by tenant for life under the original settlement.

In regard to this question, care must be taken to distinguish the cases where a tenant for life purports to convey the settled land for all the estate limited by a compound settlement from those in which he is really selling and conveying as tenant for life under a simple deed of family settlement, of which trustees for the purposes of the Settled Land Acts have been duly appointed. Where a deed of family settlement in the usual form has been executed containing powers of jointuring or charging portions and an appointment of trustees for the purposes of the Settled Land Acts, and these powers have been executed by some subsequent deed or deeds, the original deed still remains the settlement for the purposes of the Acts, and on a sale by the tenant for life thereunder the trustees thereof are the proper persons to receive the purchase money (*f*). The

(*c*) See *Re Ailesbury's Settled Estates,* 69 L. T. N. S. 493; *Re Tibbits' Settled Estates,* 1897, 2 Ch. 149; *Re Du Cane and Nettlefold's Contract,* 1898, 2 Ch. 96, 108-110. Section 50 of the Act is stated below, pp. 301, 302.

(*d*) *Re Ailesbury and Iveagh.* 1893, 2 Ch. 345, 358, 359; *Re Mundy and Roper's Contract,* 1899, 1 Ch. 275, 298.

(*e*) See *Re Spencer's Settled Estates,* 1903, 1 Ch. 75; *Re Coull's Settled Estates,* 1905, 1 Ch. 712.

(*f*) *Re Keck and Hart's Contract,* 1898, 1 Ch. 617; *Re Du Cane and Nettlefold's Contract,* 1898, 2 Ch. 96, approved *Re Mundy and Roper's Contract,* 1899, 1 Ch. 275, 296. The earlier case of *Re Tibbits' Settled*

Notwithstanding re-settlement.

original deed also remains the settlement for the purposes of the Acts and the trustees thereby appointed remain the trustees of the settlement, notwithstanding the absolute assignment over (*g*) or the re-settlement of any estate limited by the original deed in remainder after the estate of the tenant for life (*h*). Where there has been a deed of settlement creating estates for life and in tail and appointing trustees for the purposes of the Settled Land Acts, and afterwards a disentailing assurance has been executed with the concurrence of the tenant for life and a re-settlement made limiting the lands to the use of the tenant for life in restoration of his former estate or otherwise expressing the intention that the powers given to the trustees of the original deed of settlement shall not be destroyed (*i*), the tenant for life can exercise his statutory

Estates, 1897, 2 Ch. 149, which at first occasioned great difficulty to the profession, must now be taken as having decided no more than that it is within the jurisdiction of the Court to treat a deed of settlement followed by deeds exercising powers contained therein as together constituting a compound settlement and to appoint trustees of such compound settlement accordingly. It should be noted that, where land is settled subject to a general power of appointment, and the power is afterwards exercised by an appointment limiting the entire estate in the settled land to new uses, the limitations of the settlement are altogether extinguished, and the tenant for life under the settlement can no longer exercise any of the statutory powers previously incident to his life estate, and the trustees of the settlement have no longer any authority to act; see *Re Gordon and Adams's Contract,* 1914, 1 Ch. 110.

(*g*) *Wheelwright* v. *Walker,* 23 Ch. D. 752.

(*h*) *Re Knowles' Settled Estates,* 27 Ch. D. 707; *Re Du Cane and Nettlefold's Contract,* 1898, 2 Ch. 96, 101.

(*i*) See *Re Wright's Trustees and Marshall,* 28 Ch. D. 93. It is submitted that the decision in this case was correct on the ground that the powers annexed to the old life estate were kept alive by the parties' expression of their intention to that effect; although the learned judge's incidental ruling, that the old life estate was actually restored by the declaration that it should be, was held to be incorrect by the Court of Appeal in *Re Constable's Settled Estates,* 1919, 1 Ch. 178, 194, 195. In the latter case the Court considered that a limitation in a re-settlement by tenant for life and remainderman in tail of the settled land to the use of the tenant for life "in restoration of his former life estate" was ineffectual to give back to him the same life estate, with which he had parted, or to cause him to be *in* of the old use: but they recognized that the expression "in restoration of his former life estate" was sufficient to show an intention to keep alive the powers annexed to the old life estate. (1919, 1 Ch. 196; see also C. A., *Re Mundy and Roper's Contract,* 1899, 1 Ch. 294; Sargant, J., *Re Cope and Wadland's Contract,* 1919, 2 Ch. 376, 382; and see next note.) This expression was regularly used by conveyancers in deeds of re-settlement executed after the Fines and Recoveries Act, 1833, and before the Settled Land Act, 1882, in order to preserve the express powers created by the original settlement under the Statute of Uses or the law allowing executory interests to be created by will; see Wms. Real Prop. 414,

power of sale as tenant for life under the settlement made by the first deed and require the purchase money to be paid to the trustees for the purposes of the Settled Land Acts appointed by or under that deed. And he may do this, although he subsequently part with his old life estate, and even if his old life estate were extinguished by the re-settlement; since the powers conferred by the Acts are incapable of assignment or release (*k*).

426-434, 23rd ed.; Sug. Pow. 71-73, 8th ed.; 3 Davidson, Prec. Conv. 594-596, 1039, 3rd ed.; Williams on Settlements, 216, 217; and see an article by the late Mr. Charles Sweet in 63 Sol. J. 5, 20. As to the cases in which a man, who had parted with his estate at common law, was nevertheless considered to remain *in* of the old use, see Mr. Sweet's articles in 63 Sol. J. 6, 20, 79, 426, 442.

(*k*) See stat. 45 & 46 Vict. c. 38, s. 50; below, pp. 301-307; C.A., *Re Mundy and Roper's Contract,* 1899, 1 Ch. 275, 296, 297; *Re Wimborne and Browne's Contract,* 1904, 1 Ch. 537, deciding that where, after a re-settlement limiting a life estate to the old tenant for life in restoration of his former estate and a release by him of such life estate to a remainderman entitled for his life under the re-settlement, there remained in existence a jointure and portions and terms to secure the same created and charged under the original settlement, the old tenant for life could still exercise the statutory power of sale annexed to his life estate under the original settlement and require the purchase money to be paid to the trustees of the original settlement; *Re Constable's Settled Estates,* (C. A.) 1919, 1 Ch. 179, 192, 196, recognizing that, where there has been a disentailing assurance by tenant for life and remainderman in tail creating a joint power of appointment and a re-settlement *in exercise of such power* limiting the settled land to the old tenant for life for his life *in restoration of his former life estate,* he still has the statutory powers of a tenant for life under the original settlement, even though he has parted with his life estate thereunder, but deciding that, as the tenant for life had parted with his old life estate by the disentailing assurance and had taken a new life estate by the exercise of the joint power of appointment, the declaration purporting to restore his old life estate (though operative as an expression of the parties' intention to keep alive the powers annexed to the old life estate) was ineffectual actually to give back the old life estate, and that in these circumstances the tenant for life was tenant for life "under" the re-settlement and could as such exercise the statutory powers annexed to the new life estate so acquired by him and also the powers expressly conferred by the re-settlement on the tenant for life thereunder in enlargement of those statutory powers; *Re Cope and Wadland's Contract* (Sargant, J.), 1919, 2 Ch. 376, deciding that, after such a re-settlement, when made by the disentailing assurance itself and not in exercise of a joint power of appointment thereby created, the tenant for life can still sell under the original settlement and require the purchase money to be paid to the trustees thereof, notwithstanding the decision in *Re Constable's Settled Estates,* ubi sup., that the life estate under the original settlement is not actually restored. In that case no jointure, portion or other interest created by or charged under the original settlement remained in existence after the re-settlement. But the learned judge considered (following the grounds of decision in *Re Du Cane and Nettlefold, Re Mundy and Roper,* and *Re Wimborne and Browne,* ubi sup.) that, as the powers given by the Settled Land Acts to a tenant for life remain exercisable by him, notwithstanding any assignment of his

Re Wimborne and Browne's Contract.

Re Constable's Settled Estates.

Re Cope and Wadland's Contract.

It follows that, where upon such a re-settlement the former estate of the tenant for life is not expressed to be restored, and the powers given by the original settlement are not expressly preserved, the tenant for life can nevertheless, by an exercise of his statutory power, sell under the original settlement and convey all the estate thereby limited, including that dealt with by the re-settlement; and upon such a sale the trustees of the original settlement will be enabled to give a good discharge for the purchase money (*l*). As we have seen (*m*), after a settlement and re-settlement of this kind, any person who has taken a life estate under the re-settlement (whether he were tenant for life under the original settlement or not) can sell as tenant for life under the compound settlement (consisting of the original settlement and the re-settlement taken together) and convey all the estate limited by and still subsisting under such com-

Sale under the compound settlement.

life estate, the original settlement does not come to an end so long as there remains some person so capable of exercising the powers annexed by the Acts to the life estate conferred by the original settlement. He also gave weight to the expression of the parties' intention evidenced by the declaration purporting to restore the life estate, pointing out that, although he was bound by the decision in *Re Constable's Settled Estates* that such life estate was not actually thereby restored, yet the tenant for life and remainderman, being together capable of making such disposition as they might choose of the settled land, had chosen to make an arrangement under which the tenant for life was to be placed in the same position as under the original settlement both as regards estate and as regards power. It is respectfully submitted that the authority of these cases in the English Courts and the correctness of the above propositions in the text, which are founded on them, are not impugned by the decision of the Irish Court of Appeal in *Re Domvile and Callwell's Contract,* 1908, I. R. 1 Ch. 475. In that case there was an original settlement made by will and conferring a life estate on the vendor, and there was also a compound settlement consisting of the will and subsequent instruments, including a re-settlement purporting to restore the vendor's former life estate. The vendor sold under the power of sale given by the Settled Land Acts: but there were no trustees for the purposes of the Settled Land Acts either of the original or of the compound settlement. It was therefore necessary that such trustees should be appointed by the Court. The vendor contended that it was sufficient to appoint such trustees of the original settlement; the purchaser required that such trustees of the compound settlement should be appointed. The Court considered that in the circumstances of the case the vendor's opposition to the purchaser's requisition was unreasonable, and that the requisition ought to be complied with, and in exercise of their jurisdiction in that behalf, as established in *Re Tibbits' Settled Estates,* 1897, 2 Ch. 149 (see above, p. 291, n. (*f*)), they appointed trustees of the compound settlement for the purposes of the Acts.

(*l*) This point was in effect so recognized in *Re Constable's Settled Estates,* ubi sup., and so decided in *Re Cope and Wadland's Contract,* ubi sup.; see the previous note.

(*m*) Above, p. 289.

pound settlement; but in such a case trustees of the compound settlement must be duly appointed to receive the purchase money (*n*). It has further been considered that in such cases of a settlement and re-settlement, the re-settlement alone may be treated as the settlement for the purposes of the Settled Land Acts, notwithstanding that the settlement and re-settlement may together be treated as a compound settlement (*o*). If in such cases the tenant for life purport to sell and convey as tenant for life under the re-settlement alone, the purchase money can be paid to the trustees for the purposes of the Acts appointed by the deed of re-settlement: but the assurance made by the tenant for life will only operate to convey the settled land discharged from the limitations of the re-settlement; and if on such a sale any estate or interest limited by the original settlement should be still subsisting, the persons entitled thereto must concur in the conveyance to the purchaser in order to release the same.

Sale under the re-settlement.

It is submitted that the true principle governing these decisions is that, in determining whether a man is tenant for life under a series of instruments constituting a so-called compound settlement, or under what settlement he is tenant for life for the purposes of the Settled Land Acts, the real test is not whether he is *in* of his old estate or of the old use, or whether an intention of keeping alive the powers annexed to any former life estate of his has been expressed (though such intention may be a circumstance to be considered), but regard is mainly to be had to the intention of the Acts and the definitions therein contained; for the powers conferred by the Acts acquire their validity, not from any antecedent act or intention of the parties to a settlement, but from the sovereign power of the legislature alone (*p*). This principle, however, appears to

Principle to determine under what settlement one is tenant for life.

(*n*) See *Re Mundy and Roper's Contract,* 1899, 1 Ch. 275, 294, 296, 298; *Re Spencer's Settled Estates,* 1903, 1 Ch. 75.

(*o*) *Re Du Cane and Nettlefold's Contract,* 1898, 2 Ch. 96; *Re Mundy and Roper's Contract,* 1899, 1 Ch. 275, 295-296; *Re Constable's Settled Estates,* 1919, 1 Ch. 178, 193 (above, p. 293, n. (*k*)), overruling the decision of Farwell, J., in *Re Cornwallis West and Munro's Contract,* 1903, 2 Ch. 150, that, where the re-settlement limits the settled land to the former tenant for life, *in restoration of his former life estate,* he cannot exercise the statutory power of sale as tenant for life under the re-settlement.

(*p*) See *Re Ailesbury and Iveagh,* 1893, 2 Ch. 345; *Re Mundy and Roper's Contract,* 1899, 1 Ch. 275, 293-297.

have been disregarded by Farwell, J., in the case of *Re Cornwallis West and Munro's Contract* (*q*); but his decision in that case was overruled in *Re Constable's Settled Estates* (*r*). And

Re Cornwallis West and Munro's Contract.

(*q*) 1903, 2 Ch. 150; 72 L. J. Ch. 499; above, p. 295, n. (*o*). The material facts in that case were these:—By virtue of a settlement made by will lands were limited to the use of A. for life, with remainder to the use of B. in tail male, and a jointure rentcharge was limited to issue thereout to the use of C., A.'s wife. A. and B., by a disentailing assurance duly enrolled, granted the lands to X. and Y. and their heirs, to such uses as A. and B. should jointly appoint; and by a deed of re-settlement A. and B., in exercise of this power, appointed the lands to such uses as they should by deed jointly appoint, and, in default of appointment, to the use that B. should receive thereout a yearly rentcharge, and subject and charged as aforesaid to the use of A. for life in restoration of his former estate under the will, with remainder to B. in fee; and D. and E. were appointed to be trustees *of the deed of re-settlement* for the purposes of the Settled Land Acts. A. afterwards contracted to sell the lands as tenant for life selling under these Acts, and he proposed to make title as tenant for life under the deed of re-settlement, the purchase money being paid to the trustees appointed thereby, and C., the jointress, concurring in the conveyance to release her jointure. The purchaser objected to the title so offered on the ground that the will and the re-settlement constituted a "compound settlement," and that, without the appointment by the Court of trustees of such compound settlement, a good discharge for the purchase money could not be given. Farwell, J., upheld this objection on the ground that A.'s old life estate under the will had been restored to him, and so the only settlement under which A. could exercise his statutory power of sale was either the compound settlement created by the will and the deed of re-settlement together, or else the original settlement created by the will. In so deciding the learned judge professed to follow the case of *Re Mundy and Roper's Contract* (above, p. 289); but it was respectfully submitted in the first and second editions of this book that his decision was exactly opposed to the principles governing the judgment in that case and was manifestly wrong. The ground of this decision was explained in *Re Wimborne and Browne's Contract*, 1904, 1 Ch. 537, 542; and the decision was followed by Sargant, J., in *Re Constable's Settled Estates*, 1919, 1 Ch. 178, but was overruled by the Court of Appeal in the same case for the reason above stated (p. 293, n. (*k*)). Farwell, J., apparently considered that, if the tenant for life was *in* of his old estate under the original settlement, he could not also be tenant for life "under" the re-settlement for the purpose of exercising the Settled Land Act powers. But the opinion of conveyancers certainly was that, where upon a re-settlement a life estate was limited to a man in restoration of his former life estate, he was tenant for life under the new settlement as well as the old; see the form of re-settlement given in 3 Davidson, Prec. Conv. 1030, 1039, 1059, 1060, 3rd ed., where, after limiting the first life estate to A. in restoration of his former estate, the powers of leasing and of consent to the exercise of the power of sale are given to "every person *hereby made* tenant for life" (when in possession) without naming any person. And it was not doubted that in such case he could well exercise the express powers annexed to the life estate conferred by the original settlement as well as those annexed by the re-settlement to the life estate thereby limited; and it was considered to be immaterial whether he was *in* of the old use or not; see ibid. 594-596, 1293, n. (*c*); Williams on Settlements, 216, 217, 220, 221.

(*r*) 1919, 1 Ch. 178; see above, pp. 292, n. (*i*), 293, n. (*k*).

the judgments of the Court of Appeal in that case and of Sargant, J., in *Re Cope and Wadland's Contract* (*s*) have further established the principles laid down by the Court of Appeal in *Re Mundy and Roper's Contract* (*t*), and clearly show that the question, what powers are exerciseable by a tenant for life under the Settled Land Acts, is to be determined by construction of the provisions of those Acts, and does not depend upon the same considerations which governed the preservation or revival, upon a re-settlement of land, of express powers created under the Statute of Uses or the law of executory interests arising under wills.

The courses open to a tenant for life after a re-settlement.

It appears, then, that in the common case of a settlement of lands on one for life with remainder in tail followed by a disentailing assurance and a re-settlement again limiting a life estate in the lands to the original tenant for life, the following courses are open to him in selling the lands under the Settled Land Acts. First, whether his life estate were or were not limited to him in restoration of his former estate, he may sell as tenant for life under the old settlement, the purchase money being paid to trustees for the purposes of the Settled Land Acts duly appointed under the old settlement (*u*). Secondly, he may sell as tenant for life under the compound settlement constituted by the settlement and the re-settlement together and convey the whole estate limited by and still subsisting under such compound settlement: but then trustees of the compound settlement must first be appointed (*x*); and, unless all persons beneficially interested be *sui juris* and concur in making the appointment (*y*), this can only be done by the Court (*z*). Thirdly, he may sell as tenant for life under the re-settlement alone, when the trustees of the re-settlement may receive the purchase money; but in that case he can only convey the estate which was the subject of the re-settlement. This is so, not only where his life estate was *not* limited to him in

(*s*) 1919, 2 Ch. 376; above, p. 293, n. (*k*).
(*t*) 1899, 1 Ch. 275; above, pp. 289, 290.
(*u*) Above, pp. 291, 292.
(*x*) Above, pp. 288-292, 294, 295.
(*y*) See *Re Spearman Settled Estates*, 1906, 2 Ch. 502, deciding that tenant for life and tenant in tail in remainder of land free from incumbrances can, when disentailing, together appoint trustees of a compound settlement.
(*z*) *Re Spencer's Settled Estates*, 1903, 1 Ch. 75.

restoration of his former estate (*a*), but also where it was (*b*).

Sale by tenant for life deriving his estate from the re-settlement alone.

Where there has been a settlement and re-settlement and the tenant for life in possession derives his estate solely from the re-settlement and never had the estate or the powers of a tenant for life under the original settlement, he cannot of course make title as exercising the powers of a tenant for life under the old settlement, but can only sell as tenant for life either under the compound settlement or under the re-settlement alone (*c*).

The exceptions to the tenant for life's power of conveyance.

As already stated (*d*), the tenant for life is empowered to sell and convey the settled land discharged from all the limitations of the settlement, and from all estates or interests subsisting or to arise thereunder: but this power is subject to three express qualifications or exceptions, of which the first is of all estates, interests, and charges having priority to the settlement. These may be exemplified by a lease granted or a mortgage made previously to the settlement, and also by charges to which a statutory priority is given, such as estate duty (*e*) or rentcharges created under the Improvement of Land Act, 1864 (*f*). And where there has been a settlement followed by a re-settlement or re-settlements, and the vendor purports to sell as tenant for life under the re-settlement or the last re-settlement alone, then, as we have seen (*g*), that re-settlement will be the settlement for the purposes of the Acts, and any estate or interest still subsisting, which has been created by or under some instrument of earlier date than that re-settlement, will be an estate or interest having priority to "the settlement" (*h*).

Estates, &c. having priority to the settlement.

Estates, &c. conveyed or created for securing money actually raised.

The second exception is of all such *other* estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed, whereby the tenant for life exercises his power of conveyance. The word

(*a*) Above, p. 295, and n. (*o*).
(*b*) *Re Constable's Settled Estates*, 1919, 1 Ch. 176; see above, pp. 293, n. (*k*), 295, n. (*o*), 296, n. (*q*).
(*c*) Above, pp. 288-295.
(*d*) Above, pp. 287, 288.
(*e*) Stat. 57 & 58 Vict. c. 30, s. 9 (1); see the chapter on the Death Duties in the second volume.
(*f*) Stat. 27 & 28 Vict. c. 114; see ss. 49 *sq.*, 59; and see above, p. 165; below, Chap. X. § 6, Chap. XII. § 2.
(*g*) Above, p. 295.
(*h*) *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 289, 290; *Re Constable's Settled Estates*, 1919, 1 Ch. 178, 193.

other seems to relate here to the estates mentioned in the first exception; so that apparently the second exception is of all such estates, &c., other than those having priority to the settlement, as have been conveyed or created for securing money actually raised. This exception has now been judicially interpreted as being an exception (in the proper sense of the word) out of the enabling words of sect. 20 of the Settled Land Act, 1882 (*i*), and as including only such estates, interests and charges, conveyed or created for securing money actually raised at the date of the deed, *as subsist or arise under the settlement*. And it has been considered that *estates, interests and charges subsisting or to arise under the settlement and conveyed or created for securing money actually raised* include only such mortgages or charges as have been made in pursuance of some power or trust for the purpose either expressly contained in the settlement or annexed by law to some estate or interest conferred by the settlement; and that these words (those printed in italics) do not extend to mortgages or charges made by some beneficiary under the settlement of the estate or interest thereby limited to him, and created in exercise of the right of alienation incident to his ownership. In particular, it has been decided that the second exception does not include a mortgage made by the tenant for life or any remainderman of his estate under the settlement, or, where the tenant for life is also the ultimate remainderman in fee simple under the settlement, a mortgage made by him of all his estate in the settled land. And it is held that, where such a mortgage has been made, the tenant for life selling under the Settled Land Act (*k*), so long as he has obtained the consent as required by sect. 50 (*l*) of any mortgagee of his own life estate, is enabled under sect. 20 to convey the settled land to the purchaser discharged from the estate of the mortgagee or mortgagees and the charge or charges so created; and that the purchaser cannot require the mortgagee or mortgagees to concur in the conveyance (*m*). It follows of course from this decision that

Re Dickin and Kelsall's Contract.

Mortgages by beneficiaries of their interests under the settlement.

Mortgage by tenant for life or remainderman of his estate.

Purchaser cannot require the concurrence of such mortgagees.

(*i*) Stat. 45 & 46 Vict. c. 38; see above, p. 288.
(*k*) Stat. 45 & 46 Vict. c. 38.
(*l*) See below, p. 302.
(*m*) *Re Dickin and Kelsall's Contract* (Swinfen Eady, J.), 1908, 1 Ch. 213, 221. Prior to this decision, the writer's opinion was that, where a remainderman had mortgaged his estate under a settlement, a purchaser from the tenant for life selling under the Settled Land Acts could not safely accept the title without the concurrence of the mortgagee. The writer based this opinion on the wording of the Act and on the balance of authority prior to the decision above cited.

Mortgage by tenant for life and remainderman in fee.

where land limited to one for life with remainder to another in fee simple has been mortgaged by a joint assurance of their estates to one mortgagee, his consent is all that can be demanded on a sale by the tenant for life under the Settled Land Acts and his concurrence in the conveyance cannot be required. *A fortiori,* the tenant for life can convey the settled land discharged from any mortgage made by any remainderman alone of his estate or interest under the settlement, if the charge were created solely in exercise of the right of alienation incident to his ownership and not under any power or trust for the purpose contained in the settlement; and in such case neither the consent nor the concurrence of the mortgagee can be demanded.

Mortgages by the remainderman alone.

What mortgages come within the second exception.

Instances of estates, interests and charges, which do fall within the terms of the second exception and cannot be displaced by the life-tenant's power of conveyance under the Settled Land Acts are those limited or created by mortgages made to secure sums of money actually raised under some trust or power contained in the settlement, such as to charge portions for younger children (*n*), for a tenant for life or in remainder to raise and charge a capital sum for his own benefit, or for the trustees of the settlement or the tenant for life or any other person entitled thereunder to raise money by mortgage for some purpose advantageous to all the beneficiaries, for example, for discharging

His reasons were stated at large in 43 Sol. J. 274, and in the first edition of this book, vol. i. pp. 323-327, 330-334; but he expressed the view that the Court would strive to overcome the difficulty raised. These passages were omitted from the second and the present edition, because it is not likely that the above-cited decision (which is a most beneficent ruling for conveyancing practice) will be upset. It is respectfully submitted that the best justification for the decision seems to be found in the learned judge's observations (1908, 1 Ch. 218) that, if the second exception above mentioned should extend to mortgages by beneficiaries for life or in remainder of their estates under the settlement, that would go far to render any sale under the Settled Land Acts impossible, and that mortgages by the remainderman should be governed by the same rule as absolute assurances of the remainderman's estate (as to which see above, p. 292, nn. (*g*) (*h*). On this ground the decision was approved by the C. A.; *Re Davies and Kent's Contract,* 1910, 2 Ch. 35, 53 *sq.*

(*n*) *Re Gisborough's Settled Estates,* 1921, 2 Ch. 39, 49. It appears, however, that mortgages or charges made of or on a portion by the portioner alone, in exercise of the right of alienation incident to his ownership of the portion and without the concurrence of the trustees of any term limited in trust to raise the portion or any conveyance of such term, do not come within the terms of the second exception, and can be displaced by the tenant for life's conveyance; see above, pp. 298, 299.

incumbrances, enfranchising copyholds, or making improvements, or for equality of exchange or partition. The second exception also includes all estates or interests created in exercise of any power given by the Settled Land Acts (*o*) or any other statute for the tenant for life or any other person entitled under or by virtue of the settlement to mortgage or charge the settled land (*p*). And whenever it appears, upon a sale made by a tenant for life under the Settled Land Acts, that the settled land is subject to any estates or interests comprised within this second exception, the purchaser must require the persons entitled thereto to concur in the conveyance and assure their estates or interests to him (*q*). The second exception includes only estates or interests conveyed or created for *securing* money, that is, by way of mortgage or charge, and does not extend to those conveyed or created on an absolute sale, from which the settled land will be effectually discharged by the tenant-for-life's conveyance under the Settled Land Acts (*r*). And all charges, terms or other estates to secure charges, and powers of charging limited by or contained in the settlement but not actually put in use or exercised by raising money thereunder may equally well be displaced in the same way (*s*).

Purchaser must require the concurrence of all, whose charges fall within the second exception.

The third exception from the estates, which a tenant for life is empowered by the Settled Land Acts to convey (*t*), appears to be confined to leases and grants made by the tenant for life, or his predecessors or the settlement trustees in exercise of some power or trust for the purpose contained in the settlement or of some statutory power (*u*).

The third exception from the life-tenant's power of conveyance.

With regard to dispositions made by a tenant for life of his life estate in exercise of the right of alienation incident to his ownership (*x*), the Settled Land Act, 1882 (*y*), provides that

Dispositions made by the tenant for life in exercise of the right of alienation incident to his ownership.

(*o*) See stats. 45 & 46 Vict. c. 38, ss. 18, 47; 53 & 54 Vict. c. 69, s. 11; see above, p. 268.
(*p*) Swinfen Eady, J., *Re Dickin and Kelsall's Contract,* 1908, 1 Ch. 213, 221.
(*q*) See *Re Mundy and Roper's Contract,* 1899, 1 Ch. 275, 289.
(*r*) See *Wheelwright* v. *Walker,* 23 Ch. D. 752; above, p. 292; *Re Dickin and Kelsall's Contract,* 1908, 1 Ch. 213, 218.
(*s*) Stirling, J., *Re Du Cane and Nettlefold's Contract,* 1898, 2 Ch. 96, 108; *Re Mundy and Roper's Contract,* 1899, 1 Ch. 275, 290.
(*t*) Above, p. 288.
(*u*) See above, pp. 299, 300.
(*x*) Above, p. 300; Wms. Real Prop. 123, 23rd ed.
(*y*) Stat. 45 & 46 Vict. c. 38, s. 50, sub-s. 1.

the powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement; also that a contract by a tenant for life not to exercise any of his powers under the Act is void (*z*). But these provisions are to operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights are not to be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be necessary for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act (*a*). In this enactment "assignment" includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance, and "assignee" has a meaning corresponding with that of assignment (*b*). It is clear from this enactment that, where a tenant for life has mortgaged his life estate, he cannot make a valid title on a sale of the settled land under the Settled Land Acts without the *consent* of every such mortgagee (*c*). But as we have seen, it has been held that, if the tenant for life obtain the consent of every mortgagee of his life estate to his sale of the settled land under the Settled Land Acts, he can convey the land discharged from such mortgages and the purchaser cannot require the mortgagees to concur in the conveyance to him (*d*). It is thought, however, that the purchaser is entitled to require that the consent of every such mortgagee to the sale shall be absolute and not revocable, and shall be manifested as such by some writing signed by him or his authorised agent, and duly stamped as

Rights of an assignee for value of the life estate.

Mortgages by a tenant for life of his life estate.

(*z*) Sect. 50, sub-s. 2.

(*a*) Sect. 50, sub-s. 3; see *Re Mountgarret and Moore's Contract*, 1915, 1 Ch. 443.

(*b*) Sect. 50, sub-s. 4, by which sect. 50 is also extended to assignments made or coming into operation and to acts done before or after the commencement of the Act.

(*c*) *Re Sebright's Settled Estates*, 33 Ch. D. 429, 437, 438; *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338, 340, 341; *S. C.*, 41 Ch. D. 375.

(*d*) *Re Dickin and Kelsall's Contract*, 1908, 1 Ch. 213; above, p. 299.

an agreement (*e*); for the giving of such consent appears to be of the nature of a contract respecting an interest in land and so to be governed by the fourth section of the Statute of Frauds (*f*). It is a question whether a lease granted by the tenant for life in exercise of the right of alienation incident to his ownership is a partial or qualified assignment within the meaning of the above enactment: but until it is decided not to be, a purchaser from the tenant for life should require him to obtain the consent of such a lessee to the sale. The effect of the above-quoted provisions is exactly the same as regards absolute assignments as in the case of mortgages of the life estate, the consent only of an absolute assignee for value of the life estate (and not his concurrence in the conveyance) being necessary to enable the tenant for life to convey the settled land discharged from the assignee's estate (*g*). It must not be forgotten, however, that all assignments of the life estate made (whether absolutely or by way of charge) in consideration of marriage or as part or by way of any family arrangement are by the Settled Land Act, 1890 (*h*), excepted from the operation of sect. 50 of the Act of 1882; and the tenant for life is enabled, by the exercise of his power of sale and conveyance under this Act, to convey the settled land discharged from the estate or interest of any person entitled under an assignment of this kind. Thus where there has been a settlement followed by a re-settlement limiting a life estate to the same person who was tenant for life under the original settlement (whether in restoration of his former life estate or not), and he desires to sell under the Settled Land Acts as tenant for life under the original settlement (*i*), he need not obtain the consent of any person to whom he has by the re-settlement either in consideration of marriage or by way of some family arrangement made an assignment of or charged his former life estate. For instance, if the re-settlement provide that in consideration of the marriage of his eldest son (being the tenant in tail) or by way of family arrangement, the son

Lease granted by tenant for life at common law.

Absolute assignment for value of the life tenant's estate.

Assignments of the life estate in consideration of marriage or by way of family arrangement.

Settlement and re-settlement limiting rent-charges in priority to the original life estate.

(*e*) See above, p. 29, n. (*a*). It is thought that this is so, notwithstanding the case of *Re Pope's Contract*, 1911, 2 Ch. 442 (above, p. 266).

(*f*) Stat. 29 Car. II. c. 3; above, p. 3. The element of consideration appears to be present in giving such consent; as it is accorded on the terms of the mortgagee's charge being transferred to the vendor's interest in the purchase money.

(*g*) Above, pp. 298-302; see *Re Mountgarret and Moore's Contract*, 1915, 1 Ch. 443.

(*h*) Stat. 53 & 54 Vict. c. 69, s. 4; above, p. 290.

(*i*) See above, pp. 288-298.

or the son's intended wife shall have a rentcharge or rentcharges to take effect during the father's lifetime in priority to his life estate, it will not be necessary for any person entitled to such a rentcharge to consent to the sale. And every such rentcharge will be displaced by the life-tenant's sale and conveyance in exercise of his statutory powers as tenant for life under the original settlement; the purchase money can safely be paid to the trustees for the purposes of the Settled Land Acts under the original settlement; and trustees of the compound settlement need not be appointed (*k*). It appears too that, where the tenant for life has made a gratuitous assignment of his life estate, he can nevertheless sell and convey the settled land freed from the assignee's estate, without his consent (*l*). It has been held that if a tenant for life assign or release an undivided share of the land he holds to the remainderman, so as to effect a merger of the life estate therein, he nevertheless retains his statutory power of sale over the whole of the land (*m*). The tenant for life equally retains his powers under the Settled Land Acts where he has released his life estate to some remainderman entitled for life or in tail (whether under the original settlement or some re-settlement) so that the land still continues to be subject to a settlement, or (as it appears) where he has released his life estate to a remainderman in fee simple, but some rentcharge or charge of portions remains subsisting under the original settlement (*n*). And as we have seen, it has been further considered that, where tenant for life and remainderman in tail have joined in executing a disentailing assurance and a re-settlement to the use of the old tenant for life, whether in restoration of his former life estate or not, the former can still exercise the statutory powers annexed to the life

Gratuitous assignment of the life estate.

Release of the life estate.

(*k*) See above, p. 291, and cases cited in n. (*c*).

(*l*) This seems to be the case, notwithstanding that by such an assignment the tenant for life has parted with the possession or receipt of the rents and profits of the settled land, and has so ceased to come within the definition of a tenant for life in stat. 45 & 46 Vict. c. 38, s. 2 (5); see *Re Mundy and Roper's Contract,* 1899, 1 Ch. 275, 296, 297; *Re Barlow's Contract,* 1903, 1 Ch. 382, 384 (in which case it is presumed that the release was made for value); *Re Wimborne and Browne's Contract,* 1904, 1 Ch. 537, 541, 542.

(*m*) *Re Barlow's Contract,* 1903, 1 Ch. 382.

(*n*) *Re Wimborne and Browne's Contract,* 1904, 1 Ch. 537 (above, p. 293, n. (*k*)); see above, p. 303; *Re Phillimore's Estate,* 1904, 2 Ch. 460; *Re Marshall's Settlement,* 1905, 2 Ch. 325; and see *Re Trafford's Settled Estates,* 1915, 1 Ch. 9; *Re Monckton's Settlement,* 1917, 1 Ch. 224.

estate limited to him by the original settlement, notwithstanding that he parted with his old life estate by the disentailing assurance, that any declaration purporting to restore his former life estate is ineffectual to do so, and that no jointure, portion or other interest created by the original settlement remains in existence (*o*). But where no interest or charge or power remains subsisting or exercisable under the original settlement, it is a question whether the tenant for life would retain his statutory powers after the release by him to a remainderman entitled *in fee simple* of his life estate in the whole of the settled land, for then the settlement would be brought to an end (*p*).

Bankruptcy of tenant for life.

Another effect of sect. 50 of the Settled Land Act, 1882 (*q*), is that on the bankruptcy of a tenant for life his statutory powers do not pass to his trustee in bankruptcy but remain exercisable by him; and it is thought that the trustee cannot be said to be an assignee for value of the bankrupt's estate. It is also submitted that a purchaser from the trustee of the bankrupt's life estate is not "an assignee for value of the estate or interest of the tenant for life" within the meaning of sub-sect. 3 of this enactment (*r*), which seems to be intended to save only the rights of an assignee for value who has obtained the life estate by the direct assurance of the tenant for life himself (*s*).

Act of bankruptcy by the tenant for life after sale, but before completion

Where a contract for the sale of the settled land has been signed by the tenant for life, the subsequent commission by him of an act of bankruptcy, whether followed or not by an act of adjudication of bankruptcy, can be no bar to his effectual completion of the sale under the powers of the Settled Land

(*o*) See above, p. 293, n. (*k*).

(*p*) See the judgment of the C. A., raising this question, in *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 296, 297; *Re Trafford's Settled Estates*, 1915, 1 Ch. 9, deciding that a tenant in tail in possession, who had executed a disentailing assurance to the use of himself in fee simple, could not thereafter exercise the power of sale given by the Settled Land Acts to him as tenant in tail under the original settlement, notwithstanding that some annuities thereby created still remained in existence, because he had ceased to be a tenant in tail; and cf. *Re Constable's Settled Estates*, 1919, 1 Ch. 178, and *Re Cope and Wadland's Contract*, 1919, 2 Ch. 376 (above, p. 293, n. (*k*)), in which cases there continued to be a *settlement* of the land on divers persons in succession within the meaning of the Settled Land Acts.

(*q*) Above, p. 302. (*r*) Above, p. 302.

(*s*) If this were not so, then the rights of a purchaser for value from a gratuitous assignee of the life-tenant's estate could not be affected without his consent. But it is submitted that this is not the law.

Acts, and the purchaser need not require the consent or concurrence of the trustee in the bankruptcy or of any assignee from him of the bankrupt's life estate. For the trustee and any purchaser from him of the life estate would take the vendor's property subject to all equities affecting it, and to the right of the purchaser from the tenant for life to have his contract specifically performed, and the purchase money is payable, not to the trustee in the bankruptcy, but to the trustees for the purposes of the Acts or into Court (*t*). And if a tenant for life, who has already committed an act of bankruptcy or been adjudicated bankrupt, afterwards sell the settled land under the Settled Land Acts, there appears to be no doubt that he can well complete the sale in exercise of the power of conveyance given by the Acts, if the life estate has not then been sold by the trustee in the bankruptcy. Until it is established by decision that the power of the tenant for life to sell and convey is altogether paramount to the rights of his trustee in bankruptcy and any purchaser of the life estate from the trustee, it appears advisable for a purchaser of the settled land from a tenant for life, who has committed an act of bankruptcy or been adjudicated bankrupt, to ascertain, before paying his purchase money, either that no bankruptcy proceedings have been taken or no adjudication made (in either of which cases the vendor would clearly have full power to convey), or that no sale of the life estate has been made by the trustee. And if the trustee should have sold the life estate, it is thought that the purchaser from the tenant for life should require to be satisfied, before paying his purchase money, that the purchaser of the life estate does not claim to be entitled to keep hold of the settled land while the life estate endures, but will peaceably yield up possession to him on completion (*u*). Where a debtor's life estate is vested in a trustee under a composition or scheme of arrangement approved by the Court in bankruptcy proceedings prior to any adjudication of bankruptcy (*x*), it is thought that the trustee is an assignee for value taking the life estate directly

Sale under the Settled Land Acts by a bankrupt tenant for life.

Trustee taking the life estate under a composition or scheme of arrangement in bankruptcy proceedings.

(*t*) See and compare below, Chap. XI. § 2.

(*u*) It is thought that if the trustee in bankruptcy or the purchaser of the life estate should so yield up possession to the purchaser from the tenant for life, that would be equivalent to a surrender by operation of law of the life estate in the settled land; see Wms. Real Prop. 168, and n. (*f*), 228, 23rd ed.

(*x*) See stat. 53 & 54 Vict. c. 71, s. 3 (16, 17); see Wms. Pers. Prop. 276-278, 17th ed.

from the tenant for life; for the trustee acquires the life estate, not by mere operation of law, but by the debtor's own act and agreement under a contract sanctioned by the Court and in consideration of the creditors relinquishing their right to proceed to an adjudication of bankruptcy. The trustee appears in fact to be in the same position as a trustee under a deed of assignment of the life-tenant's estate executed for the benefit of his creditors without any bankruptcy proceedings having been taken. And it is thought that in either of these cases the trustee's rights cannot without his consent be affected by a sale subsequently made by the tenant for life of the settled land.

Purchaser from tenant for life should require evidence of the non-existence of estates, &c. which the latter cannot convey.

As the tenant for life is only empowered to convey the settled land for the estate or interest which is the subject of the settlement, and with the exceptions above mentioned (*y*), and cannot displace the rights of his assignees for value without their consent (*z*), it is of the highest importance for a purchaser from a tenant for life selling under the Settled Land Acts to ascertain, first, that the estate or interest which is the subject of the settlement is the whole fee simple or other estate contracted to be sold; and, secondly, that there is not any subsisting estate, interest, or charge, in or upon the lands sold which will not pass under the vendor's statutory conveyance. With regard to the first of these requirements, the purchaser's counsel must ascertain from the abstract whether the settlor were seised of or otherwise well entitled to the whole estate in fee simple or other interest sold. And if this were the case, the tenant for life under the settlement can well convey the same estate or interest by an exercise of his statutory power of sale, even though the settlor did not dispose of his whole interest by the settlement. For the Settled Land Act, 1882 (*a*), provides that an estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is, for the purposes of the Act, an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement. In order to ascertain whether there are any estates or interests coming within the exceptions out of a tenant-for-life's statutory

(*y*) Above, pp. 288, 298-310.
(*z*) Above, pp. 302, 303.
(*a*) Stat. 45 & 46 Vict. c. 38, s. 2 (2); *Re Hunter and Hewlett's Contract*, 1907, 1 Ch. 46.

power of conveyance, a purchaser from him should inquire, first, whether there are still subsisting in or upon the lands sold any estates, interests, or charges having priority to the settlement; secondly, whether any estates, interests, or charges in or upon the lands sold have been conveyed or created for securing money actually raised; thirdly, whether any such leases or grants as are mentioned in the third exception (*b*) have been made of the lands sold or any part thereof or any interest therein; and, fourthly, whether the tenant for life has made any assignment for value, whether absolute, partial, qualified or by way of charge, of his life estate. As the conveyance or creation of such an estate, interest, or charge, or the making of such a lease or grant, or such an assignment of the life estate, is an event which, if it took place, must necessarily have affected the title, it appears that the purchaser is entitled not only to insist upon an answer to this inquiry, but also to require evidence that no such event has occurred (*c*). But if the abstract be satisfactory, sufficient evidence may be afforded as to the subjects of this inquiry by a statutory declaration by the vendor that he has not made and does not know of any such estate, interest, charge, lease, or grant, and by solicitors, who have acted for the vendor and his predecessors, that they know of none, coupled with the facts of possession of the lands sold having gone, and the custody of the title deeds being, in accordance with the abstracted title (*d*). It is submitted that the making of these inquiries and the requisition of this evidence is not prohibited by the rule in the case of *Re Ford and Hill* discussed above (*e*). Sect. 20 of the Settled Land Act, 1882, does not confer on the tenant for life selling under that Act a general or an unlimited power of conveyance, but only gives him a limited power, subject to certain exceptions (*f*). It is thought, therefore, that the *onus* lies on him of proving that these exceptions have no application in his own particular case, and that he is bound to answer the above-mentioned inquiries as far as his knowledge is concerned. The practice, moreover, on sales under the Settled Land Acts is to abstract the limitations of the settlement down to the estate or interest, in virtue of which

Practice as to abstracting the settlement on sales under the Settled Land Acts.

(*b*) Above, pp. 288, 301.
(*c*) Above, pp. 120-122.
(*d*) See above, pp. 121, 122.
(*e*) 10 Ch. D. 365; above, p. 168.
(*f*) See above, pp. 288, 298 *sq.*

the vendor claims to have the statutory power of sale, but not further; and it is obvious that such an abstract is by no means conclusive of the vendor's ability to confer a good title. The purchaser is entitled to be satisfied that the vendor has not assigned, mortgaged or charged his life estate in any way, and that no charge or power of charging given by the settlement has been actually put in use or exercised by raising money, and that no lease or grant of the land sold has been made under any statutory or express power; for if any one of these events has occurred, the vendor cannot make title by himself alone (*g*). And the usual abstract standing by itself affords no information on these points. For instance, a term on trust to raise portions for younger children is generally limited in remainder after their parent's life estate (*h*); and a portion is sometimes raised thereunder in the father's lifetime, and he joins in the mortgage to secure, either by his covenant or by a charge on his life estate, the interest on the amount advanced (*i*). In such a case the father could not sell under the Settled Land Acts without the concurrence of the mortgagees in the conveyance to the purchaser. Their consent alone would not suffice to assure their legal estate under their mortgage of the portions term.

The second and third exceptions relate to interests created before the date of conveyance, not of the contract for sale.

Here it should be noted that the second and third exceptions above mentioned from the life-tenant's power of conveyance prevent him from conveying the settled land, on a sale under the Settled Land Acts, discharged from any estates or interests falling within the terms of those exceptions and conveyed or created after the contract for sale but before the date of the deed of conveyance (*k*). Thus, where since the contract but before the conveyance some estate, interest or charge has been conveyed or created under some trust or power for the purpose

(*g*) See above, pp. 150-154, 299 *sq.* In such case the purchaser, if he does not propose to repudiate the contract on that ground (see above, pp. 154-157, 178), will be entitled to require that the persons claiming under any such assurance as above mentioned shall, if assignees or mortgagees of the life estate, consent to the sale (above, pp. 302, 303), and shall, if otherwise entitled, concur in the conveyance to him, and that every such assurance shall be abstracted and produced in order to prove who the persons so claiming are.

(*h*) Davidson, Prec. Conv. vol. iii. 272, 3rd ed.; Williams on Settlements, 219.

(*i*) See Davidson, Prec. Conv. vol. ii. part ii. 460-467, and notes, 4th ed.

(*k*) Above, pp. 288, 298.

contained in the settlement (*l*) for securing money then actually raised, or some lease or grant has been made, or even agreed to be made, for value under some express or statutory power (*m*), the tenant for life cannot convey the settled land free from the estates or interests so arising, unless the persons entitled thereunder concur in the conveyance to the purchaser and assure the same to him. It follows that the above-mentioned inquiries with respect to the second and third exceptions (*n*) ought to be repeated by the purchaser and an answer obtained immediately before the execution of the deed of conveyance. But it is thought that this extra precaution is not required with regard to mortgages or other assignments for value made by the tenant for life of his own life estate under the settlement. It is now decided that any estates or interests conveyed or created by such mortgages do not fall within the second exception above referred to, and the tenant for life has power to sell and convey the settled land freed from any estate arising under his own assignment (whether absolute or by way of charge) of his life estate, provided only that he obtain the consent of every assignee for value (*o*). Where a tenant for life has made no assignment of his life estate, either absolutely or by way of charge, at the time of entering into a contract for the sale of the settled land under the Settled Land Acts, it appears that by making such a contract he exercises a statutory power which is paramount, not only in equity but at law, to the rights of any subsequent assignee of his own life estate. And it is thought that the purchaser's claim to have the contract duly completed by conveyance has priority, not only in equity but at law, over the rights of any subsequent mortgagee or assignee for value of the life tenant's estate, even though the mortgagee or assignee should have obtained a legal estate without notice of the contract for sale (*p*).

Dispositions of life estate after contract and before conveyance.

(*l*) Above, pp. 298-301.
(*m*) See above, pp. 288, 301.
(*n*) Above, p. 308.
(*o*) Above, pp. 299, 300.
(*p*) The Settled Land Act, 1882, gives to tenants for life express power to sell the settled land, and to contract to make any such sale, and enacts that every such contract shall be enforceable against every successor in title for the time being of the tenant for life; stat. 45 & 46 Vict. c. 38, ss. 3, 31 (1, 2). A sale of land is made when a binding contract for sale is entered into; see *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338, 349, 356; *Lysaght* v. *Edwards*, 2 Ch. D. 499; below. Chap. XI. § 1. And rights given by statute must be recognised and enforced by all Courts, whether of legal or equitable jurisdiction,

As to seeing that a tenant for life selling has not committed any breach of his duty as trustee.

With regard to the general necessity for a purchaser from a tenant for life selling under the Settled Land Acts to see that the terms of the sale involve no breach of duty on the vendor's part (*q*):—The tenant for life is bound, as a rule, to sell for money, as other persons are on whom a power of sale has been conferred (*r*); and he cannot sell at a price to be fixed by arbitration (*s*). Sales under these Acts are also required to be made at the best price that can be reasonably obtained (*t*); and the tenant for life, in exercising any power under the Acts, is required to have regard to the interests of all parties entitled under the settlement, and is in the position and has the duties and liabilities of a trustee for those parties (*u*). But it is enacted that, on a sale under the powers given by the Acts, a purchaser dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of the Acts (*x*). And this enactment has been held to protect the title of a purchaser, against whom no evidence of want of good faith could be produced, but who had immediately resold at a large increase in price (*y*). This provision, however, does not protect a purchaser who has notice of some improper dealing on the part of the tenant for life.

even though they may confer or create interests unknown or foreign to the previous law; see *Lord Advocate* v. *Moray*, 1905, A. C. 531.

(*q*) Above, p. 283.

(*r*) See above, p. 251. For exceptions see stats. 45 & 46 Vict. c. 38, ss. 10, 16; 53 & 54 Vict. c. 69, s. 9; Housing of the Working Classes Act, 1890 (stat. 53 & 54 Vict. c. 70), s. 74.

(*s*) *Re Wilton's Settled Estates*, 1907, 1 Ch. 50, 55, in which case, however, a private Act of Parliament had been obtained confirming a contract by a tenant for life to sell at a valuation, and it was held that by virtue of the private Act the sale was made valid and binding on all parties interested. See above, pp. 254, 255.

(*t*) Stat. 45 & 46 Vict. c. 38, s. 4 (1).

(*u*) Sect. 53. As to the duties of trustees for sale, see above, pp. 248 *sq.* As the purchase money may, at the direction of the tenant for life, be invested in real securities, he may well agree, on exercising his statutory power of sale, to leave a proper proportion of the purchase money on mortgage; see above, p. 252, and n. (*o*): but in such case the trustees of the settlement are not bound to make the investment at the direction of the tenant for life, unless they are satisfied that that direction has been given upon a proper investigation of the title and a proper report as to the value of the proposed security: *Re Hotham*, 1902, 2 Ch. 575.

(*x*) Sect. 54, also extending, in favour of a person dealing in good faith with the tenant for life, to the case of an exchange, partition, lease, mortgage or charge.

(*y*) *Hurrell* v. *Littlejohn*, 1904, 1 Ch. 689.

Thus, if the terms of the proposed sale reserve any advantage to the tenant for life personally to the detriment of the remaindermen, the statutory power will not be well exercised, and the vendor's conveyance will be void as an assurance under the Settled Land Acts (*z*). For example, the payment of a commission to the tenant for life would certainly invalidate the sale (*a*); so would a stipulation that the purchaser shall grant to the vendor a lease for years of the lands sold or any part thereof, as the benefit of such a lease would form part of the vendor's own estate, and would go on his death to his executors or administrators, and not to the persons entitled under the settlement. A stipulation in a contract for sale by a tenant for life under the Settled Land Acts that the purchaser shall pay all the vendor's costs and expenses of and incident to the sale, would not appear, as a rule, to avoid the contract; for the vendor's general costs of the sale are not payable out of his own pocket, but are properly discharged out of the purchase money or otherwise out of the capital of the settled property (*b*). But the case is different if the purchaser agree to pay any costs which ought properly to be borne by the vendor himself, such as the costs of obtaining the concurrence of mortgagees of the vendor's life estate (*c*). In this case the tenant for life would be stipulating for an advantage to himself at the expense of the remainderman, as the purchase money is obviously decreased by the amount of costs payable by the vendor personally which the purchaser contracts to discharge; and the sale would appear to be void. As we have seen (*d*), where the purchaser has notice of some non-compliance with the conditions of the Acts other than those which forbid the tenant for life to profit at the remainderman's expense, it does not appear that he can rely on the protection given by the enactment last quoted. It should be noted that this enactment only gives relief to a purchaser or other person dealing with the tenant for life, and does not validate, in favour of a subsequent purchaser, an infirm title

Stipulation that the purchaser shall pay the vendor's costs of the sale.

(*z*) See *Sutherland* v. *Sutherland*, 1893, 3 Ch. 169; *Chandler* v. *Bradley*, 1897, 1 Ch. 315; *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599.

(*a*) *Chandler* v. *Bradley*, ubi sup.

(*b*) See *Re Smith's Settled Estates*, 1891, 3 Ch. 65; *Smith* v. *Lancaster*, 1894, 3 Ch. 439.

(*c*) See *Cardigan* v. *Curzon-Howe*, 41 Ch. D. 375; *Re Sir Robert Peel's Settled Estates*, 1910, 1 Ch. 389.

(*d*) Above, p. 284.

acquired from the tenant for life by a purchaser or lessee, who had notice of some fact, which made void the attempted exercise of the statutory power (*e*). And further, it appears that if, on a purported exercise by a tenant for life of some power given to him by the Settled Land Acts, he does not comply in all respects with the conditions prescribed by the Acts, any conveyance thereby made is altogether void and not merely voidable, and does not pass the legal estate in the land (*f*); save only when the purchaser, lessee or other person dealing in good faith with the tenant for life is assisted by the enactment under discussion.

§ 3.—*Powers of sale under mortgages.*

Title depending on the exercise of a mortgagee's power of sale.

Where the title depends on the exercise by a mortgagee of a power of sale contained or implied in the mortgage deed, the purchaser's counsel must satisfy himself that the power of sale has become so exercisable that a purchaser thereunder will obtain the estate assured free from all equity of redemption or right to set aside the sale. Under the conveyancing practice prior to the year 1882, when powers of sale were usually conferred by the express terms of mortgage deeds, the common form was, first to give the mortgagee a general authority to sell at any time after the payment of the principal money secured had become due (*g*), and then to provide, particularly, that the power of sale should not be executed unless and until default should have been made in payment of the money secured at the appointed time, and the mortgagee should have given notice to pay off, and default should have been made in payment for a specified time (*h*) after such notice, or unless or until some interest should have fallen into arrear for a given period (*i*). But in every well-drawn mortgage deed an elaborate clause

Usual form of express powers of sale under the old practice.

(*e*) *Re Handman and Wilcox's Contract,* 1902, 1 Ch. 599.

(*f*) See Chitty, J., *Cardigan* v. *Curzon-Howe,* 30 Ch. D. 531, 540; *Re Norton and Las Casas' Contract,* 1909, 2 Ch. 59. In *Re Handman and Wilcox's Contract,* 1902, 1 Ch. 599, it was treated as an open question whether a lease granted under the Acts by a tenant for life to one who knew that the best rent was not reserved was void or voidable: but it is submitted that this view was mistaken, the rule as to the execution of statutory as well as express powers being that, in default of compliance with the terms of a power, any purported exercise thereof is void; see above, pp. 276, 281, 282.

Re Handman & Wilcox.

(*g*) Usually six calendar months after the date of the mortgage.

(*h*) Usually six calendar months.

(*i*) Usually three calendar months.

was inserted exonerating a purchaser from the necessity of seeing or inquiring whether any of the particular cases had arisen in which a sale was authorised, and protecting him against any impropriety or irregularity in the sale (*k*).

Title under express power of sale in the old form.

On a sale by a mortgagee under an express power of sale containing a clause for the purchaser's protection in the common form, the purchaser should, of course, abstain from making requisitions as to any matter on which he is exonerated from the duty of inquiry; for if through his own inquiries or otherwise he obtain notice of some irregularity in the sale, he must have regard thereto, and will no longer be protected (*l*). He must see, however, that sufficient time has elapsed since the date of the mortgage deed for the power of sale to become properly exercisable (*m*); but if this appear to be the case, he

(*k*) Davidson, Prec. Conv. vol. ii. pt. ii. 66 *sq.*, 79, 308-310, 4th ed. The form there given provides that, upon any sale purporting to be made in pursuance of the mortgagee's power of sale, the purchaser shall not be bound to see or inquire whether any of the particular cases has happened, in which a sale is authorised, *or whether default has been made in payment of any principal or interest secured by the mortgage deed at the time appointed for payment thereof, or whether any money remains on the security of the mortgage deed,* or as to the necessity or expediency of the stipulations subject to which the sale shall have been made, or otherwise as to the propriety or regularity of the sale; and that, notwithstanding any impropriety or irregularity whatsoever in the sale, the same shall, as regards the safety and protection of the purchaser, be deemed to be within the power and be valid and effectual accordingly, and the remedy of the mortgagor in respect of any breach of the provisions of the mortgage deed conferring the power of sale or any impropriety or irregularity whatsoever in the sale shall be in damages only. Where a mortgage deed contained a similar clause, omitting the words in italics, it was held that a purchaser buying in good faith on a sale purporting to be made in exercise of the mortgagee's power of sale was not bound to inquire whether any money remained owing upon the security of the mortgage deed, and would be protected if the money secured had been paid off at the time of the sale; *Dicker* v. *Angerstein,* 3 Ch. D. 600.

(*l*) *Parkinson* v. *Hanbury,* 1 Dr. & Sm. 143; *Selwyn* v. *Garfit,* 38 Ch. D. 273.

(*m*) *Selwyn* v. *Garfit,* 38 Ch. D. 273, where mortgage money was made payable and a power of sale given six months after the date of the mortgage deed; but it was provided that the mortgagee should not execute the power of sale unless and until default should have been made in payment at the time appointed of some principal money or interest secured, *and* the mortgagee should have given notice to pay off, *and* default should have been made in payment for three months after such notice; and it was held that a purchaser from the mortgagee purporting to exercise his power of sale seven months after the date of the mortgage deed had notice *ipso facto* that the sale was irregular; for the power could not possibly have become exercisable until three months had expired *after* the mortgage money had become payable, that is, until nine months after the date of the mortgage deed. The

need make no further inquiry (*n*). If a power of sale expressly given by a mortgage deed contain no clause for the purchaser's protection, he must ascertain not only that the event has occurred in which the power was made exercisable, but also that the mortgage is still subsisting (*o*). The power of sale incorporated by the Conveyancing Act, 1881, in mortgage deeds made after that year (*p*), and since generally relied on in practice, gives to the mortgagee a power of sale when the mortgage money has become due, but provides (*q*) that he shall not exercise such power unless and until (1) notice requiring payment of the mortgage money has been served on the mortgagor, or on one of several mortgagors (*r*), and default has been made in payment of the mortgage money or of part thereof for three months after such service (*s*); or (2) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or (3) there has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor or of some person concurring in making the mortgage to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon. This follows the old conveyancing form, except that the power is made exercisable at an earlier period (*t*); but the clause for the purchaser's protection contained in that Act (*u*) is not the

Title under the statutory power of sale.

Purchaser's protection under Conveyancing Act, 1881.

sale was therefore set aside on the mortgagor's application, the Court being of opinion that the purchaser was not relieved by a clause for his protection in common form, even though it exonerated him from the necessity of inquiring whether default had been made in payment of the money secured at the time appointed.

(*n*) See note (*k*), above, p. 314.

(*o*) *Re Edwards* to *Green*, 58 L. T. N. S. 789.

(*p*) Stat. 44 & 45 Vict. c. 41, ss. 1, 19.

(*q*) Sect. 20.

(*r*) It appears that, where the equity of redemption has been assigned, either absolutely or by way of mortgage, and the mortgagee has notice of such assignment, this notice should be served on such assignee; see *Hook* v. *Smith*, 17 Ch. D. 434; and that the only safe course for the mortgagee is to serve the notice on all the persons included, by virtue of s. 2 (vi) of the Act, in the expression *mortgagor* as used in the Act; see *Teevan* v. *Smith*, 20 Ch. D. 724.

(*s*) See *Barker* v. *Illingworth*, 1908, 2 Ch. 20, deciding that, where a notice had been served requiring payment of the principal money secured at the expiration of three calendar months from the date of the notice and warning that in default of such payment the mortgagee would proceed to sell, the mortgagee was entitled to sell on non-payment of the mortgage debt at the expiration of the three months after the date of the notice.

(*t*) Above, p. 313.

(*u*) Sect. 21 (2), providing that where a conveyance is made in professed exercise of the power of sale conferred by this Act the title

same as that usually inserted in mortgage deeds under the old practice (*x*). The Act gave no protection to a purchaser until he had obtained a conveyance from the mortgagee in professed exercise of the statutory power of sale; and it did not expressly exempt the purchaser from the duty of inquiring, before conveyance, whether the sale had been properly made. It was decided, therefore, that if the purchaser made inquiry, before accepting the title, whether any case had arisen to authorise the exercise of the power of sale, the mortgagee was bound to answer (*y*). But it was considered that, if the purchaser, buying in good faith, refrained from making any such inquiry, he would be protected against any irregularity on obtaining a conveyance (*z*). It appears, therefore, that, under the Act of 1881, the purchaser should, as a rule, have abstained from making such inquiries (*z*), and needed only to satisfy himself that sufficient time had elapsed for the power to have become properly exercisable (*a*). The Conveyancing Act, 1911 (*b*), now provides that, upon any sale made in professed exercise of the power conferred on mortgagees by the Act of 1881, a purchaser is not, and never has been, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly or regularly exercised. This enactment, however, applies only where the sale is made *in professed exercise* of the mortgagee's power of sale under the Act of 1881; that is, apparently, only where it is expressly provided in the contract of sale that the vendor is selling under this statutory power. And it seems that if the contract is silent on this point, the purchaser can rely only on the protective clause (*c*) contained in the Act of 1881. It is clear that, whether the Act of 1911 applies or not, the purchaser should abstain from making such inquiries as above mentioned; but it is thought that, even where

Purchaser's protection under Conveyancing Act, 1911.

of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(*x*) Above, p. 314, and n. (*k*).

(*y*) *Life Interest, &c. Corpn.* v. *Hand in Hand, &c. Socy.*, 1898, 2 Ch. 230.

(*z*) *S. C.*, 1898, 2 Ch. 238; *Bailey* v. *Barnes*, 1894, 1 Ch. 25.

(*a*) Above, p. 314; *Re Thompson and Holt*, 44 Ch. D. 492, 499.

(*b*) Stat. 1 & 2 Geo. V. c. 37, s. 5 (1).

(*c*) Sect. 21 (2); above, p. 315, n. (*u*).

the Act of 1911 applies, he should still satisfy himself that sufficient time has elapsed for the power of sale to become exercisable (*d*). Where a mortgage deed is executed in the usual form, providing for repayment of the money advanced, with interest, six months after the date of the deed (*e*), the earliest time at which the statutory power of sale can become exercisable is eight months after the date of the deed by the interest being two months in arrear. It appears, however, that at any time after a mortgagee's power of sale has become generally exercisable—that is, after the mortgage money has become due (*f*)—the mortgagor or his successors in estate may waive compliance with any particular restriction imposed on the exercise of the power; and in such case the mortgagee can make a good title on an exercise of the power of sale (*g*). But such waiver, to be effectual, must be given by all persons interested in the equity of redemption; thus, if the mortgagor have made a second mortgage, his waiver alone is insufficient (*h*). And where a mortgagee, selling under his power of sale, asserts that he can make a good title by means of such waiver, the purchaser is entitled and ought to require him to prove that the alleged waiver has been given by all persons interested in the equity of redemption, and at his own expense to procure all such persons to concur in the conveyance in order to confirm the sale.

Waiver of any particular restriction on the exercise of a mortgagee's power of sale.

As a rule, however, the purchaser from a mortgagee selling under his power of sale is not entitled to require the mortgagor's concurrence; that is, supposing the power to have become properly exercisable (*i*). Where the power of sale is express, the mortgagee can convey to the purchaser such estate as by the joint operation of the mortgage and the power he has been effectually authorised to convey free from equity of redemption; but if this do not comprise the entire fee simple or other estate sold, the purchaser is, of course, entitled to object to the title,

Mortgagor's concurrence cannot be required.

What estate the mortgagee can convey.

(*d*) See *Selwyn* v. *Garfit*, 38 Ch. D. 273 (above, p. 314, n. (*m*)), where the express provision for the purchaser's protection was quite as stringent as the above enactment of the Conveyancing Act, 1881; *Re Thompson and Holt*, 44 Ch. D. 492, 499.

(*e*) Wms. Real Prop. 602, 690, 23rd ed.

(*f*) Above, p. 315.

(*g*) *Re Thompson and Holt*, 44 Ch. D. 492.

(*h*) *Selwyn* v. *Garfit*, 38 Ch. D. 273.

(*i*) *Clay* v. *Sharpe*, 18 Ves. 346, n.; *Corder* v. *Morgan*, ibid. 344; Sug. V. & P. 396, 14th ed.

and may require the concurrence of all other necessary parties (*k*). A mortgagee selling under the power of sale given by the Conveyancing Act, 1881, is enabled to convey the property sold by deed for such estate and interest therein as is the subject of the mortgage (*l*). This does not empower a mortgagee who has acquired an equitable interest only in the property mortgaged to convey the legal estate therein on an exercise of the statutory power of sale (*m*), or a mortgagee of leaseholds by way of underlease to convey the original term (*n*). The Act provides (*l*) that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed exercising the mortgagee's power of conveyance thereby conferred, unless the deed is otherwise sufficient in that behalf in law or by custom. When, therefore, a mortgage of copyholds has been made in the form now usual, by a deed of covenant to surrender incorporating the statutory power of sale, followed by a conditional surrender to the use of the mortgagee (*o*), and the mortgagee has sold the legal interest under his power of sale, he must, in order to confer upon the purchaser the legal title to be admitted tenant on the court rolls (*p*), either procure the mortgagor to surrender to the purchaser's use, or himself be admitted and then execute a like surrender (*q*). The same course is necessary when a mortgagee of copyholds sells under an express power of sale (*q*).

Copyholds.

Where one has bought land from a mortgagee selling under the statutory power of sale, the purchaser's counsel should be careful to express in the deed of conveyance that the mortgagee conveys in exercise of the power of sale conferred upon him by the Conveyancing Act, 1881; as this Act only protects a purchaser taking under a conveyance made in *professed* exercise of the power of sale which it confers (*r*). This precaution

Conveyance should be in *professed* exercise of the statutory power of sale.

(*k*) See above, pp. 150, 152, 158.
(*l*) Stat. 44 & 45 Vict. c. 41, s. 21 (1).
(*m*) *Re Hodson and Howes' Contract,* 35 Ch. D. 668.
(*n*) See *Re Deighton and Harris' Contract,* 1898, 1 Ch. 458; above, p. 173, and n. (*k*).
(*o*) Wms. Real Prop. 622, 623, 23rd ed.; Davidson, Prec. Conv. vol. ii. pt. ii. 113 *sq.*, 4th ed.; 2 Key & Elphinstone, Prec. Conv. 79-82, 4th ed.; 87-89, 10th ed.
(*p*) See above, p. 149.
(*q*) Davidson, Prec. Conv. vol. ii. pt. i. 407-411, and pt. ii. 116, 4th ed.; 1 Key & Elph. Prec. Conv. 496, n. (*a*), 4th ed.; 576, n. (*c*), 10th ed.; and see *Hall* v. *Bromley,* 35 Ch. D. 642.
(*r*) Above, p. 315, and n. (*u*).

is still necessary, notwithstanding the above cited provision of the Conveyancing Act, 1911 (*s*), which merely relieves the purchaser from any obligation, or supposed obligation, to make inquiries before or upon accepting a conveyance, and does not supersede the protection given to the purchaser's title *after* conveyance by the Conveyancing Act, 1881 (*t*). And contracts and conditions of sale by a mortgagee under his statutory power should now contain an express statement that he is selling under an exercise of such statutory power, in order that the mortgagee himself and the purchaser from him may obtain the protection given by sect. 5 of the Conveyancing Act, 1911 (*u*).

So should contracts and conditions of sale under such power.

As regards mortgages made before 1st January, 1882, the power of sale given to mortgagees by Lord Cranworth's Act (*x*) may have been or may be well exercised after the year 1881, notwithstanding the repeal of the provisions of that Act by the Conveyancing Act, 1881 (*y*). The former Act affords the like protection to purchasers when a sale has been effected in professed exercise of the powers thereby conferred (*z*) as the latter statute gives when a conveyance has been made in professed exercise of the power of sale which it provided (*a*). Lord Cranworth's Act (*b*), however, empowered a mortgagee exercising the power of sale thereby conferred to convey or vest the property sold to or in the purchaser for all the estate and interest therein which the *mortgagor* had power to dispose of, and so enabled a mortgagee of leaseholds by demise to convey the original term (*c*), and a mortgagee who had obtained an equitable charge only on freeholds to assure the legal estate therein (*d*). The Act provides, however, that in the case of copyholds, the beneficial interest only shall be conveyed to and vested in the purchaser by a mortgagee selling thereunder; so

Title under the power of sale given to mortgagees by Lord Cranworth's Act.

Conveyance by mortgagee selling under Lord Cranworth's Act.

(*s*) Above, p. 316.
(*t*) Above, p. 315, and n. (*u*).
(*u*) See above, p. 316.
(*x*) Stat. 23 & 24 Vict. c. 145, ss. 11-24, 34.
(*y*) Stat. 44 & 45 Vict. c. 41, s. 71; *Re Solomon and Meagher's Contract,* 40 Ch. D. 508; *Re Boucherett,* 1908, 1 Ch. 180, 184; and see Williams' Conveyancing Statutes, 251-253.
(*z*) Stat. 23 & 24 Vict. c. 145, s. 13.
(*a*) Above, p. 315, and n. (*u*). Note the difference in the language.
(*b*) Sect. 15.
(*c*) *Hiatt* v. *Hillman,* 19 W. R. 694.
(*d*) *Re Solomon and Meagher's Contract,* 40 Ch. D. 508.

that if the mortgagee sell the legal interest he must obtain for the purchaser the legal right to be admitted tenant on the rolls by procuring a surrender to be made to his use in the usual way (*e*).

Mortgagee selling under power of sale bound only to act in good faith.

A mortgagee, in exercising his power of sale, does not stand in a fiduciary relation to his mortgagor (*f*). His only obligations are to observe the terms of the power and to act in good faith (*g*). It appears that he must sell for a price in money, unless expressly authorised to sell for some other consideration (*h*); but he may well agree to leave part of the price on mortgage of the property, he himself being charged in account with the mortgagor with the whole price (*i*). He is bound to sell fairly, and to take reasonable steps to obtain a proper price; and for this reason and because his authority is to *sell* and not to make himself full owner of the mortgaged property, he cannot sell to himself or to a trustee or an agent for himself, or rightly pursue any scheme for getting the property into his own hands under the guise of sale (*k*); but he may proceed to a forced sale for the purpose of paying the mortgage debt (*l*). He need not sell by auction, unless of course he should have been specially

(*e*) Above, p. 318.

(*f*) *Warner* v. *Jacob*, 20 Ch. D. 220; *Colson* v. *Williams*, 58 L. J. Ch. 539; *Haddington Island Quarry Co., Ltd.* v. *Huson*, 1911, A. C. 722, 729.

(*g*) *Kennedy* v. *De Trafford*, 1896, 1 Ch. 762; 1897, A. C. 180; *Nutt* v. *Easton*, 1899, 1 Ch. 873; 1900, 1 Ch. 29.

(*h*) See above, pp. 1, 251; Fisher on Mortgages, § 945, 6th ed.

(*i*) See *Davey* v. *Durrant*, 1 De G. & J. 535, 553, 554, 558, 559; *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97, 108, 109; *Bettyes* v. *Maynard*, 31 W. R. 461; 49 L. T. 389; *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 395, 396, 406, 412; *Kennedy* v. *De Trafford*, 1896, 1 Ch. 762, 764; affirmed, 1897, A. C. 180. It does not appear to have been decided whether a mortgagee can sell at a price to be fixed by valuation. But it seems to follow from the facts that a mortgagee's power of sale is given to him for his own benefit and not as a trustee, and that he may well exercise his power of sale by an agent (below, p. 322), that he can sell at a price to be fixed by valuation. For the objection to a trustee for sale selling by valuation is that this method of sale involves the delegation of his discretion to fix the price; see above, pp. 254, 255. But if a mortgagee may delegate this discretion to an agent, why may he not delegate it to a valuer, or to two valuers or their umpire?

Can a mortgagee sell at a valuation?

(*k*) *Downes* v. *Grazebrook*, 3 Mer. 200; *Robertson* v. *Norris*, 1 Giff. 421; 4 Jur. N. S. 155, 443; *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Cas. 391; *Martinson* v. *Clowes*, 21 Ch. D. 857, aff. 1885, W. N. 41; *Henderson* v. *Astwood*, 1894, A. C. 150, 158; *Hodson* v. *Deans*, 1903, 2 Ch. 647; see below, Chap. XVII.

(*l*) *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 395, 398; *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 32.

restricted to this mode of sale by the terms of his power (*m*). For example, the Court has upheld a sale by a mortgagee to one of two mortgagors, who were tenants in common, for the exact amount owing for principal, interest and costs, the bulk of the purchase money being allowed to remain on mortgage, when it appeared that the mortgagee had acted in perfect good faith, having refrained from putting the property up to auction on a surveyor's advice that it would be unlikely to realise the amount owing, and having advertised in vain for another purchaser by private contract (*n*). On the other hand, a sale by the transferee of a mortgage, immediately after the transfer, for the exact sum paid for principal and interest on taking the transfer, was set aside, as between the parties to this sale and the persons entitled to the equity of redemption, when it was shown that the transferee of the mortgage had been a mere nominee of the purchaser and there had been no *bonâ fide* exercise of the power of sale. The purchaser, however, having mortgaged the property and resold the equity of redemption prior to the commencement of the proceedings to set aside the sale to her, and the purchaser of the equity of redemption having taken a transfer of this mortgage after he had notice of such proceedings, and having proved that he had no notice at the time of his purchase of the equity of redemption of the circumstances attending the prior sale, it was held that he was not affected with constructive notice of these circumstances or of any imperfection in the prior sale, owing to the facts apparent on the face of the title or by reason of his omission to make inquiry as to the validity of the prior sale; and it was decided that he was entitled to tack the equity of redemption which he had purchased to the legal estate acquired by him under the transfer of the mortgage, and so exclude the equity of the persons originally entitled to redeem to set aside the prior sale (*o*). A mortgagee may well exercise his power of sale, notwithstanding that he has been in possession of the mortgaged property for a length of time sufficient to extinguish the mortgagor's equity of redemption under the Statutes of Limitation; and this is also the case where the mortgage has been made, not in the form

Kennedy v. *De Trafford.*

Bailey v. *Barnes.*

Sale by mortgagee in possession after mortgagor's title barred.

(*m*) *Kennedy* v. *De Trafford,* 1896, 1 Ch. 762, 767; 1897, A. C. 180, 185.
(*n*) *Kennedy* v. *De Trafford,* ubi sup.
(*o*) *Bailey* v. *Barnes,* 1894, 1 Ch. 25.

Sale after foreclosure absolute.

Sale pending foreclosure or redemption proceedings.

now usual of a conveyance with power of sale, but in the form of a conveyance on trust for sale (*p*). It appears too that a mortgagee may well exercise his power of sale after he has obtained an order for foreclosure absolute (*q*); and his right to exercise this power is not affected by the mere commencement of proceedings either by himself to obtain foreclosure, or by the mortgagor for redemption (*r*). But when the mortgagee has obtained an order for foreclosure *nisi*, giving the mortgagor the usual time within which to redeem, or the mortgagor has obtained the common order for redemption (*s*), the mortgagee may not exercise his power of sale without leave of the Court, so long as the right of redemption so reserved to the mortgagor remains open. The power is, however, not destroyed but merely suspended during this period, and if the mortgagee do exercise it within that time in favour of a purchaser taking without notice of the order, it appears that the latter will get a good title (*t*). But if the purchaser have express notice of any foreclosure or redemption proceedings, or any such proceedings be registered as a *lis pendens*, the purchaser will be bound by them and must see that no order suspending in effect the exercise of the mortgagee's power of sale has been made or is still subsisting (*u*).

Sale by the mortgagee's attorney.

Re Dowson and Jenkins's Contract.

A mortgagee entitled to exercise the statutory power of sale (*x*) may well do so by attorney: but any power of attorney given for this purpose must expressly confer either a general authority to sell all property vested in the principal by way of mortgage or a special authority to exercise the mortgagee's power of sale in respect of some particular mortgaged property (*y*). A power to sell any real or personal property belonging to the principal is not sufficient to authorise the attorney to sell property, of which the principal is only a mortgagee entitled to exercise the statutory power of sale (*z*). And though

(*p*) See *Locking* v. *Parker*, L. R. 8 Ch. 30; *Re Alison*, 11 Ch. D. 284, 290, 295.
(*q*) See *Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857, 862, 863.
(*r*) *Adams* v. *Scott*, 7 W. R. 213; *Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857, 861.
(*s*) See 3 Seton on Judgments, 1825, 1852, 7th ed.
(*t*) *Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857.
(*u*) See below, Chap. XII. § 2.
(*x*) Above, p. 315.
(*y*) C. A., *Re Dowson and Jenkins's Contract*, 1904, 2 Ch. 219, 224, 225.
(*z*) *Re Dowson and Jenkins's Contract*, 1904, 2 Ch. 219.

such a power of attorney authorise the attorney to receive and give receipts and discharges for all moneys due to the principal, that does not constitute the attorney "a person for the time being entitled to receive and give a discharge for the mortgage money" within the meaning of sect. 21, sub-sect. 4 of the Conveyancing Act, 1881 (*a*), and so enable him to exercise a mortgagee's statutory power of sale vested in his principal; for these words of the Act do not extend to a person entitled only as an agent to give a receipt and discharge (*b*). The like rule applies, of course, to express powers of sale worded in terms similar to those of the statute.

Sale by mortgagee of mines apart from surface.

Under an express power to sell the mortgaged land (*c*), or under the power of sale conferred on mortgagees by the Conveyancing Act, 1881 (*d*), a mortgagee of land, with mines or minerals thereunder, is not entitled to sell the mines or minerals apart from the surface, or the surface apart from the mines, unless authorised to do so by the terms of the mortgage deed (*e*).

Powers of mortgagees under mortgages made after 1911.

But with respect to mortgage deeds executed after the year 1911, the Conveyancing Act, 1911, now provides (*f*) that the power of sale conferred by the Act of 1881 (*g*) shall include, as incident thereto, the powers stated in the note (*h*), unless a

(*a*) Stat. 44 & 45 Vict. c. 41, authorising any person so entitled to exercise the power of sale conferred on mortgagees by that Act.

(*b*) See note (*z*), p. 322.

(*c*) Above, p. 313.

(*d*) Stat. 44 & 45 Vict. c. 41, s. 19; above, p. 315. This is, of course, to be understood of the statutory power of sale before the amending enactment of the Act of 1911 stated below.

(*e*) Cotton, L. J., *Re Yates*, 38 Ch. D. 112, 121. A mortgagee, if not so authorised, may apply to the Court under sect. 44 of the Trustee Act, 1893, as amended by sect. 3 of the Trustee Act, 1894 (stats. 56 & 57 Vict. c. 53; 57 & 58 Vict. c. 10), to sanction such sale; see above, p. 254; *Re Beaumont's Mortgage Trusts*, L. R. 12 Eq. 86; *Re Wilkinson's Mortgaged Estates*, L. R. 13 Eq. 634; *Re Hirst's Mortgage*, 45 Ch. D. 263.

(*f*) Stat. 1 & 2 Geo. V. c. 37, ss. 4, 16 (2).

(*g*) Stat. 44 & 45 Vict. c. 41, s. 19.

(*h*) (i) A power to impose or reserve or make binding, so far as the law permits, by covenant, condition or otherwise, on the unsold part of the mortgaged property or any part thereof, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing. (ii) A power to sell the mortgaged property, or any part thereof, or any mines or minerals apart from the surface: (a) with or without a grant or reservation of rights of way, rights of water, easements, rights and privileges for or connected

contrary intention be expressed in the mortgage deed. These powers authorise the sale either of the surface or of the mines separately, and enlarge in other respects a mortgagee's statutory power of sale.

Sale by mortgagee of fixtures.

Neither an express nor the statutory power to sell the mortgaged land confers on a mortgagee of land, with fixtures thereon, the right to sell the fixtures separately from the land, unless authority to do so be given by the terms of the mortgage deed (*i*). But as in the case of a sale by trustees, it does not appear that this rule prohibits the stipulation, on a sale by a mortgagee of land together with the fixtures thereon, that the purchaser shall pay a further sum for the fixtures in addition to the price to be paid for the land (*k*). The same principles seem to be applicable to the sale under his power of sale by a mortgagee, who has not entered into possession, of land with timber growing thereon (*l*); but under a mortgage deed executed after the year 1881, the mortgagee is empowered, in the absence of the expression of a contrary intention, *while in possession*, to cut and sell timber, or to contract for any such cutting and sale to be completed within any time not exceeding twelve months from the making of the contract (*m*). It appears that, apart from the enlarged powers conferred by the Conveyancing

Timber.

with building or other purposes in relation to the property remaining in mortgage or any part thereof, or to any property sold; (b) with or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage and other powers, easements, rights and privileges for or connected with mining purposes in relation to the property remaining unsold or any part thereof, or to any property sold; (c) with or without covenants by the purchaser to expend money on the land sold. For the purpose of exercising any power conferred by this section, an application under the above mentioned sections of the Trustee Acts, 1893 and 1894 (see note (*e*), p. 323 above), shall not be required.

(*i*) *Re Yates*, 38 Ch. D. 112; *Re Brooke*, 1894, 2 Ch. 600, 611-614; and see *Re Rogerstone Brick and Stone Co.*, 1919, 1 Ch. 110, 120, 123, 124. The statutory power of sale does not appear to be extended in this respect by sect. 4 of the Conveyancing Act, 1911; see previous note.

(*k*) See above, p. 255. On a sale by a mortgagee under his power of sale there appears to be no objection to a stipulation that the purchaser shall pay for the fixtures at a valuation; see above, p. 320, n. (*i*).

(*l*) See *Re Yates*, 38 Ch. D. 112, 120-122, 124-126, 128, 129; *Born* v. *Turner*, 1900, 2 Ch. 211, 215.

(*m*) Stat. 44 & 45 Vict. c. 41, s. 19 (i, iv).

Act, 1911 (*n*), a mortgagee selling under his power of sale a part of the mortgaged land, may at the same time grant to the purchaser an easement over the unsold part, if required for the convenient enjoyment of the part sold (*o*).

Grant by mortgagee of easement over unsold part of mortgaged land.

By the Courts (Emergency Powers) Act, 1914 (*p*), every person was prohibited, during the continuance of the Act (*q*), (a) from enforcing any judgment or order (*r*) of any Court for the payment or recovery of any sum of money, *not* being a sum of money (other than rent at less than (*s*) 50*l*. per annum) due and payable in pursuance of a contract made *on or after* the 4th of August, 1914, and (b) from levying any distress, taking or entering into possession of any property (*t*), foreclosing, realising any security (except by way of a sale by a mortgagee in possession), or forfeiting any deposit for the purpose of enforcing or in default of the payment or recovery of any such sum of money, without (in either case) first making such application to the Court as provided for by the Rules under the Act (*u*). This enactment obviously prohibited mortgagees

Restrictions on mortgagee's powers by Courts (Emergency Powers) Act, 1914.

(*n*) Above, p. 323.

(*o*) *Born* v. *Turner*, 1911, 2 Ch. 211, 215, 216.

(*p*) Stat. 4 & 5 Geo. V. c. 78, s. 1 (1), passed 31st Aug. 1914.

(*q*) This Act and the enactments amending it continued in force generally until twelve months after the termination of the war, and expired at midnight on the 31st August, 1922; but they remain in force, as to orders made by any Court before that day, until the 31st December, 1923. See stats. 4 & 5 Geo. V. c. 78, s. 2 (4); 10 Geo. V. c. 5, s. 1; 12 & 13 Geo. V. c. 50; Order in Council of 10th August, 1921; 65 Sol. J. 793, 811; 66 ibid. 712.

(*r*) Whether entered or made before or after the passing of the Act.

(*s*) The Act says "other than rent not being rent at or exceeding 50*l*. per annum."

(*t*) It was held that the Act did not make it necessary for a mortgagee suing the mortgagor for possession of the mortgaged property, or for a landlord suing his tenant for possession under a proviso for re-entry in a lease, to obtain the leave of the Court before issuing the writ in the action: but that the Act required the leave of the Court to be obtained before any writ of execution could be issued for enforcing a judgment for possession in any such action; see *Ness* v. *O'Neil*, 1916, 1 K. B. 706; *National Bank, Ltd.* v. *Claffey*, 1917, 2 I. R. 281.

(*u*) See the Courts (Emergency Powers) Rules, 1918 (consolidating and revoking the Rules of 1914 and the amending Rules), and further Orders of 1918; W. N. 12th Jan., 16th March, and 10th Aug. 1918. On any such application the Court was empowered, if it was of opinion that time should be given to the person liable to make the payment on the ground that he was unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the war, in its absolute discretion by order to stay execution, or defer the operation of any such remedies as aforesaid, for such time and subject to such conditions as it should think fit; stat. 4 & 5 Geo. V. c. 78, s. 1 (2).

under mortgages made *before* the 4th of August, 1914 (*x*), who had not entered into possession of the mortgaged property, from realising their security by the exercise of their power of sale, without first obtaining the leave of the Court thereunder. By an amending Act of 1916 (*y*), it was provided that in the above enactment (a) the expression "enter into possession" should include the appointment of a receiver of mortgaged property, (b) the provisions relating to foreclosure should extend to *the institution* of proceedings for foreclosure or for sale in lieu of foreclosure (*z*), and (c) the expression "mortgagee in possession" should include a mortgagee who before the passing of the principal Act (*a*) had appointed a receiver who was still in possession or receipt of the rents and profits of the mortgaged property (*b*), but should not include a mortgagee of property other than (*c*) land or some interest in land, except in any case where the power of sale had arisen and notice of intended sale had been given prior to the 4th of August, 1914 (*d*). It was

Amending Act of 1916.

(*x*) This enactment may possibly have extended to mortgages made on or after the 4th Aug. 1914, to secure money due under a contract made before that date; see *O'Flaherty* v. *Gethings*, 1916, 1 I. R. 265.

(*y*) Stat. 6 & 7 Geo. V. c. 18, s. 1, which was to take effect as from the 25th May, 1916.

(*z*) It had previously been decided that the Act of 1914 did not prohibit the issue of a writ or summons for foreclosure, or in a debenture-holder's action, or the making of an order for foreclosure *nisi*, without obtaining the leave of the Court, but only required such leave to be obtained for making an order for foreclosure absolute; *Re Farnol, Eades, Irvine & Co., Ltd.*, 1915, 1 Ch. 22; *Behagg* v. *Palmer*, 1914, W. N. 416; *Ness* v. *O'Neil*, 1916, 1 K. B. 706, 709. It was held that, under the amending Act of 1916, it was necessary to obtain the leave of the Court both for issuing a writ or summons for foreclosure and also for making an order for foreclosure absolute; *Reversionary Interest Society, Ltd.* v. *Unwin*, 1917, W. N. 366; 87 L. J. Ch. 235.

(*a*) See above, p. 325, n. (*p*).

(*b*) *Re A. W. Hill, Ltd. and Simmons's Contract*, 1920, W. N. 386.

(*c*) It was held that, under the Act of 1914, the exception, allowing a mortgagee in possession to realise his security by sale without the leave of the Court, applied, not only to mortgages of land, but also to mortgages, including equitable mortgages by deposit, of personal chattels, or of things in action, such as the debentures of or shares in a company, and even where such chattels or the documents of title to such things had been placed in the mortgagee's possession under the terms of the security, from the beginning of the loan; *Ziman* v. *Komata Reefs Gold Mining Co., Ltd.*, 1915, 2 K. B. 163; *Foster* v. *Barnard*, 1916, 2 A. C. 154.

Amendment of the Act as respects members of His Majesty's forces.

(*d*) By stat. 6 & 7 Geo. V. c. 13, ss. 1, 3, in favour of officers and men of His Majesty's Forces, sect. 1 (1) of the above Act of 1914 was to apply to any sum of money due and payable in pursuance of a contract made before the 11th April, 1916, and the discretionary powers conferred upon the Courts by sect. 1 (2) of the Act of 1914 might be

decided that a sale by a mortgagee, who had *not* entered into possession, under his power of sale was not of itself a realisation of his security within the meaning of the above enactment, but was only a step towards such realisation, and was therefore not void, if made without first obtaining the leave of the Court; but it was held that, as the receipt of the purchase money *is* the realisation of the security, it was necessary to obtain the leave of the Court under this Act before any such sale was completed by conveyance; and further that the omission by the vendor to apply for an order of the Court sanctioning the sale was a breach of contract for which he was liable to pay substantial damages (*e*). It appears therefore that, on any sale *completed* during the continuance of the above Act (*f*) by a mortgagee selling under the power of sale incident to a mortgage to which the Act applied (*g*), and not having previously entered into possession or appointed a receiver, as provided by the Act of 1916 (*h*), of the mortgaged land, an order of the Court sanctioning the sale is a necessary part of the purchaser's title. For without such an order the mortgagor's equity of redemption of the land sold would not be extinguished by the conveyance completing the sale (*i*); and the conveyance would have no greater effect, as against the mortgagor, than a transfer of the mortgage. But as any person entitled to the benefit of the above enactments might waive it (*k*), the necessity for obtaining such an order might be dispensed with if the mortgagor consented. It was held in Ireland that the expression "mortgagee in possession" as used in the above Acts means a mortgagee who has gone into possession without any leave from the

Braybrooks v. *Whaley.*

Waiver of the benefit of the Act.

Re Provident Association of London, Ltd., and Gollogaly's Contract.

exercised although the debtor's inability to pay might not be due to circumstances attributable directly or indirectly to the war (see note (*u*), above, p. 325). And by stat. 7 & 8 Geo. V. c. 25, s. 8, in favour of such officers and men, sect. 1 (1) of the Act of 1914 was to apply to any sum of money due and payable in pursuance of a contract made before the officer or man had joined His Majesty's Forces.

(*e*) *Braybrooks* v. *Whaley,* 1919, 1 K. B. 435; see above, p. 36; below, Chap. XIX. § 2.

(*f*) See above, p. 325, n. (*p*) and (*q*).

(*g*) See above, p. 326.

(*h*) See above, p. 326.

(*i*) See above, pp. 317, 318.

(*k*) Sargant, J., *Re Sandow, Ltd.*, 1916, W. N. 262, 263. The rule is that any person may renounce a privilege given to him for his own exclusive benefit by statute; *Markham* v. *Stanford,* 14 C. B. N. S. 376, 382, 383; *Rumsey* v. *North Eastern Ry. Co.*, ibid. 641, 649, 651, 653; *Great Eastern Ry. Co.* v. *Goldsmid,* 9 App. Cas. 927, 936; *Toronto Corpn.* v. *Russell,* 1908, A. C. 493, 500.

Renunciation of privilege given by statute.

Court; and that when a mortgagee had entered into possession with the leave of the Court obtained as required by the Act of 1914 (*l*), he was not entitled to exercise his power of sale without obtaining a further order of the Court authorising him to realise his security by sale (*m*). This decision seems to place a restriction not warranted by the terms of the Act on the powers of a mortgagee in possession; and it remains to be seen whether it will be followed in England. Its effect is to place any sale completed during the continuance of the Act by a mortgagee in possession selling under his power of sale, *who had obtained possession with the leave of the Court under the Act*, on the same footing as a completed sale by a mortgagee who had *not* entered into possession; and to make an order of the Court giving leave to enforce the security *by sale* a necessary part of the title (*n*). The provisions of the above Acts remain material, now that they have ceased, to the title during their continuance to any land then comprised in any mortgage affected thereby.

Restrictions on mortgagee's rights and remedies by the Increase of Rent and Mortgage Interest (War Restrictions) Acts.

Under the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, and the Acts of 1917 and 1919 amending it, the rate of interest on any mortgage, to which those Acts applied, was prevented from being raised, during their continuance, as to mortgages under the Act of 1915 above the standard rate of interest as defined in that Act, and as to mortgages within the Act of 1919 above one-half per cent. per annum in excess of such standard rate of interest (*o*). And

(*l*) Above, p. 325, and n. (*t*).

(*m*) *Re Provident Association of London, Ltd. and Gollogaly's Contract*, 1917, 1 I. R. 240.

(*n*) See above, p. 327.

(*o*) Stats. 5 & 6 Geo. V. c. 97 (passed 23rd Dec. 1915), s. 1 (1); 7 & 8 Geo. V. c. 25 (passed 10th July, 1917), s. 5; 9 Geo. V. c. 7 (passed 2nd April, 1919), ss. 1, 3, 4. Stat. 8 Geo. V. c. 7 (the Amendment Act of 1918), only affected tenants. It was repealed by 9 & 10 Geo. V. c. 90 (the second Act of 1919), which also only affected tenants.

Duration of the Acts.

The Act of 1915 (s. 5 (2)) was to continue in force during the continuance of the war and for a period of six months thereafter: but the expiration of the Act was not to render recoverable any interest, which during the continuance thereof was irrecoverable. By the Act of 1919 (s. 1) the Act of 1915 and the enactments amending it were to continue in force until Lady Day, 1921, but during the period between the time when but for the Act of 1919 the Act of 1915 would have expired and the said Lady Day, subject to the modifications contained in sects. 2, 3 of the Act of 1919.

Mortgages within the Act of 1915.

The Act of 1915 (s. 2 (4)) applied to every mortgage where the mortgaged property consisted of or comprised one or more dwelling-houses, to which that Act applied,

the mortgagee under any mortgage to which those Acts applied was prohibited, during the continuance of those Acts (*p*), and so long as interest at the standard rate (*p*) was paid and was

or any interest therein, but not (a) to any mortgage comprising one or more dwelling-houses to which that Act applied and other land, if the rateable value of such dwelling-houses was less than one-tenth of the rateable value of the whole of the land comprised in the mortgage, or (b) to an equitable charge by deposit of title deeds or otherwise, or (by sect. 2 (6) of the Act of 1915, as amended by sect. 7 of the Act of 1917) (c) where the rent payable in respect of any tenancy of a dwelling-house was less than two-thirds of the rateable value thereof, to any mortgage by the landlord, from whom the tenancy is held, of his interest in the dwelling-house (but in this case the Act was to apply in respect of such dwelling-house as if no such tenancy existed or had ever existed). And (by sect. 2 (5) of the Act of 1915) where that Act had become applicable to any mortgage on a dwelling-house, it was to continue to apply thereto, whether or not the dwelling-house continued to be one to which that Act applied. The expression "mortgage" in the Act of 1915 (s. 2 (1) (e)) includes a land charge under the Land Transfer Acts, 1875 and 1897; and the exception in that Act of an equitable charge includes a charge on land by writing without any deposit of title deeds; *Jones* v. *Woodward*, 1917, W. N. 61, 116 L. T. 378; also a charge made to secure an overdraft to a bank by deed, wherein the mortgagor undertakes to execute a legal mortgage when required, and declares himself trustee for the bank and empowers the bank to remove him from the trusteeship and appoint themselves or others trustees in his place; *London County and Westminster Bank, Ltd.* v. *Tompkins*, 1918, 1 K. B. 515. The Act of 1919 (s. 4) extended the Act of 1915, as from the passing of the Act of 1919, and with the modifications thereby made, to like mortgages (not being mortgages under the Act of 1915) of or comprising houses within the Act of 1919, and to increases made since the 25th Dec. 1918, of interest on mortgages within the Act of 1919. By the Act of 1915 (s. 2 (1) (b)) the standard rate of interest meant in the case of a mortgage in force on the 3rd Aug. 1914, the rate of interest payable at that date, or in the case of a mortgage created since that date, the original rate of interest. By the Act of 1915 (s. 1 (1)) the amount of any excess of mortgage interest above the rate thereby permitted was made irrecoverable notwithstanding any agreement to the contrary; and by the Act of 1917 (s. 5 (1)) any sum paid on account of such excess was made recoverable from the mortgagee as therein provided. And the Act of 1919 (s. 4 (1)) substituted a new provision for sect. 1 (1) of the Act of 1915, adapting that sub-section to the increases of rent and mortgage interest permitted by the Act of 1919. The above enactments did not apply to any mortgage interest which accrued due, as to mortgages under the Act of 1915, before the 25th Nov. 1915, and as to mortgages within the Act of 1919, before the 4th March, 1919 (Act of 1915, s. 1 (1) (i), amended by Act of 1919, s. 4 (ii)), or where the rate of mortgage interest had been increased in compliance with or in consequence of a notice in writing demanding either repayment of the mortgage or an increased rate of interest and given prior to the 4th Aug. 1914 (Act of 1915, s. 1 (1) (v)). The Act of 1919 (s. 3) allowed an increase in the rate of interest on mortgages under the Act of 1915 in respect of the period for which the Act of 1915 was extended by the Act of 1919, if the increase did not exceed one-half per cent. per

Mortgages within the Act of 1919.

Standard rate of interest.

(*p*) See previous note.

not more than twenty-one days in arrear, and the covenants by the mortgagor (other than the covenant for the repayment of the principal money secured) were performed and observed, and so long as the mortgagor kept the property in a proper state of repair and paid all interest and instalments of principal recoverable under any prior incumbrance (*q*), from calling in his mortgage or taking any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money secured (*r*): but this provision was not (1) to apply to a mortgage where the principal money secured thereby was repayable by means of periodical instalments extending over a term of not less than ten years from the creation of the mortgage; nor (2) to affect any power of sale exerciseable by a mortgagee who was (as to mortgages within the Act of 1915) at the 25th November, 1915, or (as to mortgages within the Act of 1919) at the 4th March, 1919, a mortgagee in possession (*s*); nor (3) to apply in cases where the mortgagor consented to the exercise by the mortgagee of the powers conferred by the mortgage; and (4) if, in the case of a mortgage of a leasehold interest, the mortgagee satisfied

annum, and the rate of interest when so increased did not exceed 5 per cent. per annum. But since the "extended period" (see sect. 1) was from the time when the Act of 1915 would, but for the Act of 1919, have expired till Lady Day, 1921, and the Act of 1915 would not have expired at that date, the extended period never took effect. The Act of 1915 (s. 2 (2)) applied to a house or part of a house let as a separate dwelling, where such letting did not include any land other than the site of the dwelling-house and a garden or other premises within the curtilage of the dwelling-house, and where *either* the annual amount of the standard rent *or* the rateable value of the house or part of the house did not exceed (a) in the case of a house situate in the metropolitan police district, 35*l.*, and (c) in the case of a house situate elsewhere (except in Scotland), 26*l.*: but that Act did not apply to a dwelling-house let at a rent which included payments in respect of board, attendance or use of furniture. By the Act of 1919 (s. 4), as from the passing of that Act, the Act of 1915 and the enactments amending it were to extend to houses or parts of houses let as above mentioned where (a) in the case of a house situated in the metropolitan police district, including the City of London, *both* the annual amount of the standard rent and the rateable value of the house or part of the house exceeded 35*l.* and neither exceeded 70*l.*, and (c) in the case of a house situated elsewhere (except in Scotland), *both* the annual amount of the standard rent and the rateable value of the house or part of the house exceeded 26*l.* and neither exceeded 52*l.* And (by sect. 8 of the Act of 1919) neither the Act of 1915 nor the Act of 1919 was to apply to houses erected after or in course of erection at the passing of the Act of 1919 (2nd April, 1919).

Dwelling-houses within the Act of 1915.

House let furnished.

Dwelling-houses within the Act of 1919.

(*q*) See *Walters* v. *White*, 1917, W. N. 14; 116 L. T. 377.
(*r*) See *Welby* v. *Parker*, 1916, 2 Ch. 1.
(*s*) See *Walters* v. *White*, 1917, W. N. 14; 116 L. T. 377.

the County Court that his security was seriously diminishing in value or was otherwise in jeopardy, and that for that reason it was reasonable that the mortgage should be called in and enforced, the Court might by order authorise him to call in and enforce the mortgage (*t*). These provisions applied to all mortgages within these Acts of whatever date, and remain material, since the Acts have been repealed, to the title, during the period of the continuance of the Acts, to any land then comprised in such a mortgage.

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

All of the above enactments (*u*) were repealed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*x*). By this Act the rate of interest on any mortgage, to which the Act applies, is prevented from being raised, since the 25th March, 1920, and during the continuance of the Act, above the amount by which it is thereby permitted to exceed the standard rate of interest as therein defined (*y*). And the mort-

(*t*) Stat. 5 & 6 Geo. V. c. 97, s. 1 (4), amended by 9 Geo. V. c. 7, s. 4 (ii).

(*u*) Stats. 5 & 6 Geo. V. c. 97; 7 & 8 Geo. V. c. 25, ss. 4, 5, 7; 9 Geo. V. c. 7; 9 & 10 Geo. V. c. 90.

(*x*) Stat. 10 & 11 Geo. V. c. 17 (passed 2nd July, 1920), s. 19 (3). The Act is not confined to the case where the relation of landlord and tenant exists, and consequently protects a mortgagor in possession: *Woodifield* v. *Bond*, 1921, W. N. 309; *contra*, *Re Hegan*, 1921, 1 I. R. 189.

Duration of the Act. Standard rate of interest. Permitted increase in rate of interest. Mortgages to which the Act applies.

(*y*) Sects. 1, 4, 14. This Act, except as therein otherwise provided, *i.e.*, as to business premises, below, p. 332 n., is to continue in force until the 24th June, 1923; sect. 19 (2). The standard rate of interest means, in the case of a mortgage in force on the 3rd Aug. 1914, the rate of interest payable at that date, or in the case of a mortgage created since that date, the original rate of interest; sect. 12 (1) (b). The amount, by which the increased rate of interest may exceed the standard rate, is an amount not exceeding one per cent. per annum (this is so even though a higher rate was valid under the Act of 1915; *Hollands* v. *Cooper*, 1921, W. N. 298; 125 L. T. 850); but the rate is not to be increased so as to exceed six and a half per cent. per annum; and, except in the case of a dwelling-house to which this Act applies but the repealed enactments did not apply (see above, p. 328, n. (*o*)), the increase during a period of one year after the passing of this Act was not to exceed one-half per cent. per annum; sect. 4. This Act applies to every mortgage (including a land charge under the Land Transfer Acts, 1875 and 1897) where the mortgaged property consists of or comprises one or more dwelling-houses to which it applies: but not (a) to any mortgage comprising one or more dwelling-houses to which this Act applies and other land, if the rateable value of such dwelling-houses is less than one-tenth of the rateable value of the whole of the land comprised in the mortgage, or (b) to an equitable charge by deposit of title-deeds or otherwise (see cases cited in n. (*o*) to p. 328, above), or (c) to any mortgage which is created after the passing

gagee under any mortgage, to which this Act applies, is prohibited during the continuance of the Act (*z*), and so long as

Dwelling-houses to which the Act applies.

of this Act; sect. 12 (1) (h), (4). This Act applies to a house or part of a house let as a separate dwelling where either the annual amount of the standard rent or the rateable value does not exceed, (a) in the metropolitan police district, including the City of London, 105*l.*, and (c) elsewhere (except in Scotland), 78*l.*; and every such house or part of a house is to be deemed to be a dwelling-house to which this Act applies: but (i) this Act is not, save as otherwise expressly provided, to apply to a dwelling-house *bonâ fide* let at a rent which includes payments in respect of board, attendance (see *Nye* v. *Davis*, 1922, 2 K. B. 56), or use of furniture; and (ii) the application of this Act to any house or part of a house is not to be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes; in confirmation of *Epsom Grand Stand Association* v. *Clarke*, 1919, W. N. 170; see *Coles* v. *Parnham*, 1922, 1 K. B. 325; and (iii) for the purposes of this Act any land or premises let together with a house is, if the rateable value of the land or premises let separately would be less than one-quarter of the rateable value of the house (see *Wellesley* v. *White*, 1921, 2 K. B. 204), to be treated as part of the house, but, subject to this provision, this Act is not to apply to a house let together with land other than the site of the house; sect. 12 (2); see *Read* v. *Goater*, 1921, 1 K. B. 611. Any rooms in a dwelling-house subject to a separate letting wholly or partly as a dwelling are to be treated as part of a dwelling-house let as a separate dwelling; sect. 12 (8). Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof (*i.e.*, net and not *gross* value: *Waller* v. *Thomas*, 1921, 1 K. B. 541; and see *Mackworth* v. *Hellard*, 1921, 2 K. B. 755), this Act is not to apply to that rent or tenancy nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling-house, and this Act is to apply in respect of such dwelling-house as if no such tenancy existed or ever had existed; sect. 12 (7). The Act is to apply to any premises used for business, trade or professional purposes or for the public service as it applies to a dwelling-house (as to letting rooms for lodgings, see *Tompkins* v. *Rogers*, 1921, 2 K. B. 97): but this provision was to continue in force until the 24th June, 1921, only; sect. 13. This Act is not to apply to a dwelling-house erected after or in course of erection on the 2nd April, 1919, or to any dwelling-house which has been since that date or was at that date being *bonâ fide* reconstructed by way of conversion into two or more separate and self-contained flats or tenements; sect. 12 (9); see *Woodward* v. *Samuels*, 89 L. J. K. B. 689. Apart from this provision a conversion into flats may constitute them separate tenements, the standard rent of each being the rent at which it was first let: *Sinclair* v. *Powell*, 1922, 1 K. B. 393. Where this Act has become applicable to any dwelling-house or any mortgage thereon, it is to continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies; sect. 12 (6). But only while the house is used as a dwelling-house; not after it has been converted into premises used for another purpose, such as a factory; *Phillips* v. *Barnett*, 1922, 1 K. B. 222. Standard rent means the rent at which the dwelling-house was let on the 3rd Aug. 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after that day, the rent at which it was

Houses let furnished.

Where part of house used for business purposes.

House let together with land other than its site.

Rooms let separately as a dwelling.

Where the rent is less than two-thirds of the rateable value.

Business premises.

Houses erected after or being erected on the 2nd April, 1919, or since then, or then being converted into flats.

The Act once applying to continue applicable.

Standard rent.

(*z*) See previous note.

interest at the rate permitted under this Act is paid and is not more than twenty-one days in arrear, and the covenants by the mortgagor (other than the covenant for the repayment of the principal money secured) are performed and observed, and the mortgagor keeps the property in a proper state of repair (*a*) and pays all interest and instalments of principal recoverable under any prior incumbrance, from calling in his mortgage or taking any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money secured. But this provision is not (1) to apply to a mortgage where the principal money secured thereby is repayable by means of periodical instalments extending over a term of not less than ten years from the creation of the mortgage;

Prohibition of calling in mortgages to which the Act applies.

first let: but in the case of any dwelling-house let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable thereunder is to be the standard rent; and where, at the date by reference to which the standard rent is calculated, the rent was less than the rateable value, the rateable value at that date is to be the standard rent; sect. 12 (1) (a). Nothing in this Act is to be taken to authorise any increase in the rate of interest on a mortgage except in respect of a period during which, but for this Act, the security could be enforced; sect. 3 (1). Where the rate of interest on a mortgage, to which this Act applies, has been since the 25th March, 1920, or is after the passing of the Act increased, then, if the increased rate of interest exceeds by more than the amount permitted under this Act the standard rate of interest, the amount of such excess is, notwithstanding any agreement to the contrary, to be irrecoverable from the mortgagor (sect. 1); or if paid, it is to be recoverable from the mortgagee who received the payment or his legal personal representative, and may, without prejudice to any other method of recovery, be deducted by the mortgagor from any interest payable by him to the mortgagee; sect. 14 (1). Any such increase made since the 25th March, 1920, but before the passing of the Act, may be cancelled as provided in the Act; sect. 1. When a mortgage comprises one or more dwelling-houses to which this Act applies and other land, and the rateable value of such dwelling-houses is more than one-tenth of the rateable value of the whole of the land comprised in the mortgage (p. 331, n., above), the mortgagee may apportion the principal money secured by the mortgage between such dwelling-house and such other land by giving one calendar month's notice in writing (stating the particulars of the apportionment) to the mortgagor; and then, subject to the mortgagor's right before the expiration of the notice to dispute the amounts so apportioned and to the matter being determined in default of agreement by an arbitrator appointed by the President of the Surveyors' Institution, at the expiration of such notice this Act shall not apply to the mortgage so far as it relates to such other land, and for all purposes, including the mortgagor's right of redemption, the said mortgage shall operate as if it were a separate mortgage for the respective portions of the said principal money secured by the said dwelling-houses and such other land respectively, to which such portions were apportioned; sect. 12 (5).

House let at a progressive rent.

Where the rent, at date for fixing standard rent, is less than the rateable value.

Effect of an increase exceeding the permitted amount.

Increase made before the 2nd July. 1920.

Apportionment of mortgage money secured by a mortgage of houses within the Act and other land, where the rateable value of the houses is more than one-tenth of that of the whole land mortgaged.

(*a*) *I.e.*, having regard to the general condition of the property at the date of the mortgage; *Woodifield* v. *Bond*, 1922, 2 Ch. 40.

nor (2) to affect any power of sale exerciseable by a mortgagee who was on the 25th March, 1920, a mortgagee in possession; nor (3) to apply in cases where the mortgagor consents to the exercise by the mortgagee of the powers conferred by the mortgage. And if, in the case of a mortgage of a leasehold interest, the mortgagee satisfies the County Court that his security is seriously diminishing in value or is otherwise in jeopardy, and that for that reason it is reasonable that the mortgage should be called in and enforced, the Court may by order authorise him to call in and enforce the mortgage, and thereupon the above provision shall not apply to such mortgage: but any such order may be made subject to a condition that it shall not take effect if the mortgagor, within such time as the Court directs, pays to the mortgagee such portion of the principal sum secured as appears to the Court to correspond to the diminution of the security (*b*). The provisions of this Act will remain material, after it shall have ceased, to the title during its continuance to any land then comprised in any mortgage to which the Act applies.

Where, on mortgage of leaseholds, the security is in jeopardy.

Purchase of foreclosed property.

When property is purchased, to which a mortgagee has become entitled under a decree of foreclosure absolute (*c*), care must be taken to ascertain that all persons interested in the equity of redemption were bound by the foreclosure proceedings (*d*), and that there were not any circumstances, attending the making of the order, which would induce the Court to re-open the foreclosure (*e*).

(*b*) Stat. 10 & 11 Geo. V. c. 17, s. 7; see cases cited above, p. 330, n. (*q*) and (*r*).
(*c*) Wms. Real Prop. 610, 611, 23rd ed.
(*d*) See *Gee* v. *Liddell*, 1913, 2 Ch. 62.
(*e*) See *Campbell* v. *Holyland*, 7 Ch. D. 166; 1 Dart, V. & P. 468, 6th ed.; 478, 7th ed.

CHAPTER X.

OF PARTICULAR TITLES.

§ 1. Sale of copyholds.
§ 2. Sale of leaseholds.
§ 3. Sale of lands in a register county or compulsory registration district.
§ 4. Voluntary conveyances.
§ 5. Sale of ground rents, reversions and remainders, mines, roads, rivers, &c.
§ 6. Sale of purely incorporeal hereditaments.
§ 7. Sale of charity lands.
§ 8. Sale of partnership property.
§ 9. Sale by order of the Court.
§ 10. Sale of an equity of redemption.
§ 11. Sale of licensed property.
§ 12. Land subject to restrictive covenants.
§ 13. Investigation of title in view of a mortgage.

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§ 1.—*Sale of copyholds.*

Copyholds.

On the sale of copyholds, the purchaser, in the absence of special stipulation, is equally entitled to have the whole legal and equitable estate vested in him as in the case of freeholds (*a*). In copyholds, however, what comes under the head of the legal estate is the tenancy of the lands sold on the court rolls of the manor, of which they are held, for the customary estate comprised in the contract for sale; and what the vendor has to prove is that he can confer this right. He will have discharged his obligation if he show either that he is himself the tenant on the rolls of such an estate, and so can surrender the same to the purchaser's use, or that he can, by the exercise of a power of

Legal estate in copyholds.

Vendor's obligation.

(*a*) Above, p. 149; *Re Wilson's and Stevens's Contract*, 1894, 3 Ch. 546, 549.

appointment, give the purchaser a direct right to be admitted of such an estate, or that some other person is such a tenant, and that he (the vendor) is entitled to call upon that tenant to surrender to the use of the purchaser (*b*). It must be borne in mind, however, that if there is no tenant upon the rolls, and the vendor cannot by appointment give the purchaser a direct right to be admitted, the vendor must, at his own expense, procure a tenant to be admitted who shall be able to execute the necessary surrender to the purchaser. And for this purpose the vendor must himself pay all fines due to the lord in consequence of such admittance (*c*). For example, if A., a tenant of copyholds in customary fee, devise them to B. and C. on trust for sale, and these devisees after A.'s death sell them to D., B. and C. and cannot at once give D. the right to be admitted, but must themselves first be admitted tenants on the rolls; after which they will be enabled to execute such a surrender to D.'s use as will give him the legal right to be admitted. But if A.'s will had contained a power (as distinct from a trust) for B. and C. to sell his copyholds, or if A. had devised his copyholds to such uses as B. and C. should appoint for the purpose of giving effect to any sale made by them under the trust declared in that behalf, then, if B. and C. were to sell to D. before the lord had seized *quousque* for want of a tenant, D. would be entitled to claim admittance directly as being in fact the person entitled under A.'s will (*d*). And it has been held that if a tenant in customary fee of copyholds devise them to trustees, on trust for one for life, and the tenant for life sell and convey them under the powers given by the Settled Land Act, 1882 (*e*), before the trustees have been admitted or the lord has seized *quousque*, the purchaser is entitled to be admitted on payment of a single fine (*f*). It must be remembered that the lord is entitled to exact the fine due by the custom on

Fines payable by vendor.

Sale under power in will—

under Settled Land Act.

What fines due to lord.

(*b*) Above, pp. 150, 151.

(*c*) See *Bradley* v. *Munton*, 16 Beav. 294; *Paramore* v. *Greenslade*, 1 Sm. & Giff. 541; *Whiteley* v. *Taylor*, 35 L. T. N. S. 187; *Re Thames Tunnel, &c. Act*, 1900, [1908] 1 Ch. 493.

(*d*) *Glass* v. *Richardson*, 9 Hare, 698; 2 De G., M. & G. 658; *R.* v. *Wilson*, 3 B. & S. 201; *Sissons* v. *Chichester Constable*, 1916, 2 Ch. 75, 85; Sug. V. & P. 562; Davidson, Prec. Conv. vol. ii. pt. i. p. 375, n., 4th ed., vol. iv. p. 82, n., 3rd ed.; Wms. Real Prop. 536, 537, 23rd ed.

(*e*) Stat. 45 & 46 Vict. c. 38, ss. 3, 20 (1) (3), which enables an equitable tenant for life of settled copyholds to convey them on a sale under the Act by deed to be entered on the court rolls.

(*f*) *Re Naylor and Spendla's Contract*, 34 Ch. D. 217.

every change in the tenancy of lands held of him by copy of court roll. Thus, if A., tenant of copyholds in customary fee, die intestate leaving B. his heir, and B. die intestate without having been admitted and leaving C. his heir, and then C. sell the land to D., C. must, as we have seen, procure himself to be admitted in order to give to D. the title promised by the contract. But in order to procure his admittance, C. will have to pay a double fine, namely, that due on the devolution of the estate from A. to B. as well as that payable on his own admission as B.'s heir (*g*). The lord is not, however, entitled to any fine by reason of the devolution of any equitable estate or interest in lands holden by him by copy; he is only concerned with the changes in the legal tenancy upon the court rolls (*h*). So that if A., tenant of copyholds, sell them to B. and surrender to B.'s use, and B., without being admitted, sell the lands to C., and C., remaining unadmitted, sell to D., there is no need for either B. or C. to be admitted in order to complete C.'s contract with D., but C. can call upon A., who has remained the tenant upon the rolls, to surrender to D.'s use, and upon the execution of such surrender D. will be entitled to be admitted on payment of a single fine. If A. had died, his heir or devisee (*i*) would have to be admitted at C.'s expense in order to surrender to D.; but the only fine payable by C. would be that incurred by the admittance of A.'s heir or devisee (*k*). The purchaser of copyholds must pay the fine due on his own admittance, the vendor being only liable to pay any fines necessary to enable himself to confer on the purchaser the right to admittance (*l*).

None on devolution of equitable estate.

Fine payable by purchaser.

If A. sell and surrender copyholds to the use of B. and his heirs and B. die intestate before being admitted, then under the Land Transfer Act, 1897 (*m*), B.'s equitable estate in the land would vest in his administrator, who would thus have the

Fines on admittance after the death of an unadmitted surrenderee.

(*g*) *Morse* v. *Faulkner*, 1 Anst. 11, 13; *Morris* v. *Clarkson*, 3 Swanst. 558, 563, 566; Watson, B., *Garland* v. *Alston*, 3 H. & N. 390, 393, 395; *Londesborough* v. *Foster*, 3 B. & S. 805; 1 Scriv. Cop. 383, 405, 3rd ed.

(*h*) *Hall* v. *Bromley*, 35 Ch. D. 642.

(*i*) See above, pp. 200, 204, 205.

(*k*) 1 Scriv. Cop. 404, 3rd ed.; *Garland* v. *Alston*, 3 H. & N. 393; *Hall* v. *Bromley*, ubi sup.

(*l*) *Drury* v. *Man*, 1 Atk. 95, 96, and n.; *Graham* v. *Sime*, 1 East, 632; Sug. V. & P. 632; Dart, V. & P. 709, 710, 5th ed.; 801, 6th ed.; 716, 717, 7th ed.; 1 Scriv. Cop. 384, 3rd ed.; above, p. 336, and n. (*c*).

(*m*) Stat. 60 & 61 Vict. c. 65, s. 1 (1); above, pp. 211, 221.

right to be admitted (*n*). It is a question whether the administrator claiming to be admitted under A.'s surrender would have to pay a single or a double fine (*o*). But as A. remains the lord's tenant on the rolls until some one else is admitted (*n*), and would be a trustee for B. and his heirs, it appears that B.'s administrator might call upon A. as such trustee to surrender to his use, and might well claim to be admitted under this surrender on payment of a single fine (*p*). And if, in the case put, B.'s administrator, before being admitted, convey his estate in the copyholds to B.'s heir (*q*), it appears that B.'s heir will then be entitled to be admitted, and no fine will be payable in respect of the conveyance from the administrator to the heir (*r*). But if B. had devised his estate in the copyholds or appointed executors by his will, it appears that his executors, taking under the Land Transfer Act, 1897, or his devisee in case the executors assented to the devise (*s*), could only be admitted on payment of a double fine; since the Wills Act provides that, where a testator was entitled to be admitted to any real estate of the nature of copyholds and might, if he had been admitted thereto, have surrendered the same to the

Devise by an unadmitted surrenderee.

(*n*) See *Payne* v. *Barker*, O. Bridg. 18, 21-25, 33; *Doe* d. *Tofield* v. *Tofield*, 11 East, 246, 250; 1 Wat. Cop. 307 and n. (2), 4th ed.; Wms. Real Prop. 528, 23rd ed.

(*o*) In 1 Wat. Cop. 364, n. (1), and 1 Scriv. Cop. 404, 405, 3rd ed., the opinion is expressed that the heir of an unadmitted surrenderee is entitled to be admitted on payment of a single fine; and this opinion appears to be fortified by the rule laid down in *Hall* v. *Bromley*, 35 Ch. D. 642. Mr. Elton, however, asserted that if the surrenderee die before admittance his heir must pay two fines; Elton on Copyholds, 169 (182, 2nd ed.): but the authorities cited (in the 2nd ed. only) contain nothing to support this view. In *Garland* v. *Alston*, 3 H. & N. 390, 395, Watson, B., said that, if the heir is entitled only on the ground that the ancestor was entitled to be admitted, *and the lord could have compelled the ancestor to come in and pay his fine on admittance*, the heir must pay a double fine. These conditions are not fulfilled in the case of the heir of an unadmitted surrenderee; since the lord could not have compelled the ancestor to come in and be admitted, the tenancy continuing to be full in the person of the surrenderor. It is thought that the case of the heir of an unadmitted surrenderee is distinguishable from that of an heir claiming a copyhold tenement by descent after the death and intestacy of an unadmitted heir of an admitted tenant, who also died intestate; see above, pp. 337, and n. (*g*), 338, n. (*n*).

(*p*) This appears to follow from the decision in *Hall* v. *Bromley*, ubi sup. But of course if the administrator took and obtained admittance upon such a surrender to him from A., as trustee for him, his legal title would date from that surrender only and would not relate back to the surrender from A. to B.; see Wms. Real Prop. 529, 23rd ed.

(*q*) See above, pp. 212, 213, 215-217.

(*r*) See *Hall* v. *Bromley*, 35 Ch. D. 652.

(*s*) See above, pp. 212, 213, 215-217.

use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate *in consequence of such will* shall be entitled to be admitted to the same except on payment of all such stamp duties, fees, fine and sums of money as would have been payable in respect of the admittance of the testator thereto and his subsequent surrender thereof to the use of his will, in addition to the stamp duties, fine, &c. payable on the admittance of the person so entitled or claiming (*t*).

§ 2.—*Sale of leaseholds.*

Leaseholds.

The principal duties of a conveyancer advising a purchaser of leasehold land have been already noticed (*u*). He must see that the lease or term offered by the abstract corresponds at all points with that offered by the contract. The purchaser is entitled to require the assignment to him of a lease from the freeholder unless the contract distinctly specified an underlease as the subject of the sale (*x*). And it is now settled that, notwithstanding the general rule that notice of a document is notice of its contents (*y*), a purchaser of leasehold land is entitled to object to the title if the covenants contained in the lease are more onerous or stringent than those usually inserted in leases of like character to that purchased, unless the existence of such covenants were brought to his notice at the time of entering into the contract, either through express mention therein or through his having been afforded an opportunity of inspecting the contents of the lease (*z*). So we have seen that the existence of a considerable ground rent not mentioned in the particulars on the sale of houses held for a long term of years may be an objection to the title (*a*). A stipulation is frequently made on the sale of leaseholds by auction that the lease will be produced at the sale and may be inspected at the

(*t*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 4; *Londesborough* v. *Foster*, 3 B. & S. 805.

(*u*) Above, pp. 93, and n. (*i*), 149, 150, 163 sq.

(*x*) Above, p. 93, n. (*i*).

(*y*) Above, p. 232.

(*z*) *Reeve* v. *Berridge*, 20 Q. B. D. 523; *Midgley* v. *Smith*, 1893, W. N. 120; *Re White and Smith's Contract*, 1896, 1 Ch. 637; *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487; see also *Nouaille* v. *Flight*, 7 Beav. 521; *Re Davis* to *Cavey*, 40 Ch. D. 601; above, p. 190. This is so even though the contract provide that the vendor's title shall be accepted: *Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666.

(*a*) Above, p. 165.

office of the vendor's solicitors at any time within a week previously to the sale, and that any purchaser shall be deemed to have full notice of the contents of the lease, whether he avail himself of the opportunity of inspection or not (*b*). A purchaser of leaseholds buying under such a stipulation as this cannot, of course, object to anything contained in the lease (*c*); unless, indeed, an actual misrepresentation has been made by the vendor, in the particulars of sale or otherwise, as to the contents of the lease (*d*).

Evidence that a lease held subject to a condition of re-entry has not determined.

When the property purchased is held for a term of years determinable by re-entry for non-payment of rent or breach of covenant (*e*), it is, of course, important to ascertain that no cause of forfeiture under the condition of re-entry has occurred. Before the year 1882, the purchaser in such a case was entitled, in the absence of stipulation to the contrary, to require evidence that all the covenants and conditions in the lease had been duly performed and observed up to the date of the actual completion of the contract (*f*). It was, however, usually stipulated that production of the receipt for the last payment of rent due before the completion of the sale should be conclusive evidence of this (*g*). At the present time, the purchaser's rights in this respect are regulated, in the absence of special stipulation, by the following provision of the Conveyancing Act, 1881 (*h*):— Where land sold is held by lease (not including underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase. This provision is less stringent than the special stipulation previously usual, which was construed as obliging the purchaser to accept the title, not-

(*b*) 1 Key & Elph. Prec. Conv. 270, 4th ed.; 288, 10th ed.
(*c*) See *Lawrie* v. *Lees*, 14 Ch. D. 249, 252, 257; *Re Derby and Fergusson's Contract*, 1912, 1 Ch. 479.
(*d*) See *Van* v. *Corpe*, 3 My. & K. 269; *Flight* v. *Barton*, ib. 282; above, p. 184.
(*e*) Wms. Real Prop. 366, 560, 23rd ed.
(*f*) 1 Davidson, Prec. Conv. 536, 4th ed.; *Palmer* v. *Goren*, 25 L. J. Ch. 841.
(*g*) 1 Davidson, Prec. Conv. 537, 624, 648 and n. (*y*), 4th ed.
(*h*) Stat. 44 & 45 Vict. c. 41, s. 3 (4).

withstanding the existence of a continuing breach of the covenants in the lease (*i*). The stipulation contained in the Act only binds the purchaser to assume, unless the contrary shall appear, that the covenants have been performed, and does not preclude him from objecting to the title on the ground that a cause of forfeiture has occurred, if it appear that a breach of covenant has in fact been committed and has not been waived (*k*). Receipt of rent by a landlord is a waiver of forfeiture for breaches of covenant which have occurred and been brought to his notice before the rent became due (*l*): but it is not a waiver on account of breaches of which he had no notice (*m*), or subsequent breaches (*n*), or the subsequently continuing breach of a continuing covenant (*o*). Production of a receipt for rent is not, therefore, in itself complete evidence of any waiver of a breach of covenant. But a purchaser buying under the present statutory stipulation must, on production of the last receipt for rent in accordance therewith, assume (unless the contrary appear) that the covenants have been duly performed, not only prior to the receipt of rent, but up to the date of actual completion of the purchase. It has been decided that the statutory stipulation does not apply where the land sold is held under a lease for years at a peppercorn rent, or indeed at any other rent in kind and not in money; in which case the purchaser has the same right to require strict evidence of the performance of the lessee's covenants as in the case of an open contract made before the year 1882 (*p*).

Waiver of forfeiture by receipt of rent.

(*i*) See *Bull* v. *Hutchens*, 32 Beav. 615; *Lawrie* v. *Lees*, 14 Ch. D. 249; 7 App. Cas. 19, 30-33, 37-39, 42.

(*k*) *Re Highett and Bird's Contract*, 1902, 2 Ch. 214; 1903, 1 Ch. 287; *Re Taunton, &c. Bdg. Socy. and Roberts' Contract*, 1912, 2 Ch. 381.

(*l*) *Bridges* v. *Longman*, 24 Beav. 27, 30; *Davenport* v. *The Queen*, 3 App. Cas. 115; *Jacob* v. *Down*, 1900, 2 Ch. 156; *Stephens* v. *Junior Army and Navy Stores, Ltd.*, 1914, 2 Ch. 516; *New River Co.* v. *Crumpton*, 1917, 1 K. B. 762, 765; *R.* v. *Paulson*, 1921, 1 A. C. 271; cf. *Evans* v. *Enever*, 1920, 2 K. B. 315.

(*m*) *Pennant's Case*, 3 Rep. 64; *Ewart* v. *Fryer*, 1901, 1 Ch. 499, 502, 511; *S. C., nom. Fryer* v. *Ewart*, 1902, A. C. 187; *Matthews* v. *Smallwood*, 1910, 1 Ch. 777, 786 *sq.*

(*n*) See *Marsh* v. *Curteys*, Cro. Eliz. 528; 3 Rep. 65 a; *Price* v. *Worwood*, 4 H. & N. 512.

(*o*) *Doe* v. *Gladwin*, 6 Q. B. 953, 963; *Penton* v. *Barnett*, 1898, 1 Q. B. 276; *Jacob* v. *Down*, 1900, 2 Ch. 156; *New River Co.* v. *Crumpton*, 1917, 1 K. B. 762.

(*p*) *Re Moody and Yates' Contract*, 28 Ch. D. 661; 30 Ch. D. 344. In this case there was a covenant to finish a house within six months to the satisfaction of the lessor's surveyor, and it was held that the

Title to leaseholds where there is a continuing breach of covenant.

It appears that, where there is a continuing breach of a continuing covenant (such as a covenant to repair), a good title is not shown under an open contract, embodying the statutory stipulation, although the landlord accept rent up to the day of completion, for what the purchaser would get would be a lease forfeitable for breach of covenant (*q*).

Stipulation that last receipt for rent shall be conclusive evidence of performance of covenants.

But where a special stipulation is made, that the landlord's receipt for the last payment of rent *shall be conclusive evidence* of the performance of the covenants and conditions of the lease up to the date of actual completion of the purchase, the purchaser is bound thereby, and cannot object to the title on the ground that breaches of covenant have occurred or that there are, prior to completion, continuing breaches of a continuing covenant (*r*).

Lawrie v. *Lees.*

And where an order has been made at the vendor's suit for the specific performance of a contract containing such a stipulation, the purchaser cannot object to the title, on the inquiry into title, on the ground that there is a continuing breach of a continuing covenant, which will be a cause of forfeiture *after* completion, for the title then to be shown is a good title according to the contract only (*s*). When the contract contains such a stipulation, it appears that the purchaser may nevertheless object to specific performance of the contract being enforced against him, if the vendor remaining in possession has, since the date of the contract and before its completion, *wilfully* committed a breach of covenant, which would make the lease forfeitable (*t*).

surveyor's certificate to this effect was a part of the vendor's title, and that the expense of procuring the same was therefore not payable by the purchaser under sect. 3 (6) of the Conveyancing Act, 1881; see above, pp. 32, 97, 112, 124.

(*q*) See *Re Taunton, &c. Bdg. Socy. and Roberts' Contract,* 1912, 2 Ch. 381, 386.

(*r*) *Bull* v. *Hutchens,* 32 Beav. 615; *Lawrie* v. *Lees,* 14 Ch. D. 249; 7 App. Cas. 19; Parker, J., *Taunton, &c. Bdg. Socy. and Roberts' Contract,* 1912, 2 Ch. 381, 385.

(*s*) *Lawrie* v. *Lees,* 14 Ch. D. 249; 7 App. Cas. 19. It seems, however, to be a question whether, if there were such a continuing breach, and the lessor were actually seeking to enforce the forfeiture therefor, the purchaser could not object, *at the trial* of the vendor's action for specific performance, to the Court's making an order for specific performance on the ground that, owing to the liability to forfeiture immemediately after completion, the title was such as the Court would not oblige an unwilling purchaser to take; see *S. C.,* 14 Ch. D. 249, 258, 261, 262; 7 App. Cas. 19, 30-33, 37-39, 42; above, pp. 191, 192; below, Chap. XIX. § 3 (as to the doubtfulness of the title).

(*t*) See *Howell* v. *Kightley,* 21 Beav. 331, as explained in *Lawrie* v. *Lees,* 14 Ch. D. 249, 255; 7 App. Cas. 19, 31; *Palmer* v. *Goren,* 25 L. J. Ch. 841; Sug. V. & P. 370, 371.

Whose duty it is to perform the covenants after a sale.

As a rule, it is the vendor's duty to perform at his own expense all the covenants of the lease up to the day fixed or other proper day for completion of the contract (*u*); after which the burden and expense of performing the covenants falls upon the purchaser (*x*). It appears, however, that a vendor remaining in possession after the date fixed for completion ought not wilfully to allow the due performance of the covenants to lapse where the consequence would be to make the lease forfeitable, but he should (at least where the delay in completion is owing to the state of the title and not to the purchaser's fault) apply to the purchaser for funds to enable him to perform the covenants (*y*). It may be pointed out that leases containing provisoes for re-entry on breach of covenant remain *forfeitable* on breach of covenant, notwithstanding the restrictions imposed by sect. 14 of the Conveyancing Act, 1881, on the *enforcement* of such forfeiture (*z*).

Purchaser buying leaseholds with notice of a breach of covenant that cannot or will not be remedied.

We have seen (*a*) that if a man buy land with notice, either oral or written but not contained in the contract for sale, that a good title cannot or will not be made, the vendor is exonerated from showing title to the extent indicated by the notice, unless he should have *expressly* agreed by the contract for sale to show a good title. It follows, therefore, that if one buy leasehold land with notice so given to him that there has been a breach of covenant, which cannot or will not be remedied by the vendor, he is precluded, unless the contract contain an *express* stipulation that the vendor shall show a good title, from requiring the evidence, to which he would otherwise be entitled, that the covenant in question has been duly performed. Thus, where houses held under a repairing lease are obviously dilapidated and the purchaser agrees, outside of the written contract, to take them as they are, it is thought that he could not insist on the vendor furnishing evidence of his performance of the covenant to repair. The rule in question, though perfectly well established,

(*u*) See above, pp. 27, 43, 46, 52.
(*x*) *Dowson* v. *Solomon*, 1 Dr. & Sm. 1, 11.
(*y*) See *Palmer* v. *Goren*, 25 L. J. Ch. 841; Sug. V. & P. 370, 371; *Dowson* v. *Solomon*, 1 Dr. & Sm. 1, 12 *sq.*
(*z*) See *Cresswell* v. *Davidson*, 56 L. T. 811, 812; *Re Lloyd's Bank, Ltd. and Lillington's Contract*, 1912, 1 Ch. 601, 608, 609; *Taunton, &c. Bdg. Socy. and Roberts' Contract*, 1912, 2 Ch. 381, 386; and consider *Rogers* v. *Rice*, 1892, 2 Ch. 170.
(*a*) Above, p. 188.

Re Highett and Bird's Contract.

was, however, unaccountably overlooked both by the vendor's counsel, by Swinfen Eady, J., and by the Court of Appeal in the case of *Re Highett and Bird's Contract* (*b*). In that case the purchaser bought under an open contract a leasehold house, which was obviously out of repair, and *the vendor accepted a reduced price in consequence.* Before the title was accepted, the vendor was served with a "dangerous structure" notice from the London County Council under the London Building Acts, 1894 and 1898, requiring him to pull down or render secure a part of the house. The notice not being complied with, a police court order was made requiring him to do the repairs within fourteen days. This order was made before, but not served on the vendor till after the acceptance of the title. The vendor, who had produced the receipt for the last quarter's rent (*c*), took out a vendor and purchaser summons for a declaration that he had shown a good title, and that the expense of complying with the police court order was an outgoing (*d*) which ought to be borne by the purchaser. The vendor's counsel mainly contended that this expense had not ripened into a charge or liability until after the proper time for completion (*d*), and that under the Conveyancing Act, 1881 (*e*), production of the last receipt was conclusive evidence of performance of the covenant to repair. It was held (and in this respect, no doubt, rightly) that, under the statutory stipulation, such production is only *primâ facie* evidence of performance of the covenant, and that the purchaser is not obliged to accept it as conclusive where he has notice of a breach of the covenant (*f*). It was, however, decided in both Courts that the vendor was under an obligation to prove that the covenant to repair had been performed, and was *for this reason* bound to defray the expense of complying with the notice and order; and the Courts declined to consider at what time this liability became a charge. But it is submitted that this decision cannot be supported on the ground so assigned for it. The Courts rested their judgment on the supposed authority of the case of *Barnett* v. *Wheeler* (*g*). That case, however, was an action of *assumpsit* by a purchaser, in which the declaration stated a sale of leaseholds on the express

(*b*) 1902, 2 Ch. 214; 1903, 1 Ch. 287.
(*c*) Above, p. 342.
(*d*) See above, p. 46, and below, Chap. XI.
(*e*) Above, p. 342.
(*f*) Above, pp. 340, 341.
(*g*) 7 M. & W. 364.

condition that the vendor should make a good title, and was argued on demurrer to a plea that the vendor made a good title in all respects except as to compliance with a covenant to repair, and that the purchaser knew that the property sold was out of repair. It was considered that the plea was bad, but Parke, B., particularly mentioned that there was an express contract to make a good title. This accords with the rule stated above (*h*). As already mentioned, this rule was not brought to the notice of either Court in *Re Highett and Bird's Contract,* nor were any of the authorities cited by which it is established. No doubt under an open contract for the sale of leaseholds, without more, the vendor is bound to prove that there is no liability to forfeiture by reason of the non-performance of a covenant to repair (*i*); and this may be the case notwithstanding that the property is obviously out of repair, for it may be contemplated that the vendor shall perform the covenant before completion (*j*). But where a vendor is induced to accept a lower price than he would otherwise take on account of the property being out of repair, it is submitted that the parties plainly intend to waive all objection to the title caused by the non-performance of a covenant to repair, and must be taken to have contracted on that footing. This view appears to have commended itself to Lord Justice Romer, who explained in a subsequent case (*k*), that *Re Highett and Bird's Contract* was decided on the footing that the vendor was in the same position as if he had expressly agreed to make a good title; and declared that that case was not to be taken as an authority for any case in which there is not an express contract by the vendor to make a good title. To avoid all question, however, of the application of the decision above criticised, a vendor selling houses held under a repairing lease should be most careful to stipulate expressly in the contract for sale that the purchaser shall be deemed to have notice of the actual state and condition of the property, and shall take the houses as they are (*l*). And a vendor of leaseholds should always employ an express stipulation, such as was generally used before the Conveyancing Act, making production of the last receipt for rent *conclusive* evidence of the performance of all covenants, and providing

(*h*) Pp. 188, 343. (*i*) Above, p. 340.
(*j*) See 7 M. & W. 366, 367.
(*k*) *Re Allen and Driscoll's Contract,* 1904, 2 Ch. 226, 231.
(*l*) As to the efficacy of such a stipulation, see *Lockharts* v. *Bernard Rosen & Co.,* 1922, 1 Ch. 433.

further, if necessary, that the person giving such receipt, though not the original lessor, shall be assumed to be the reversioner or his agent (*m*). In default of this last proviso, the vendor would have to prove that the giver of the receipt, if not the lessor, was the reversioner or his agent.

Sale of land held by underlease.

Where land held by underlease is sold as such, the purchaser cannot of course reject the title because he is not getting a term granted by a lease from the freeholder (*n*); but he has the same right as the purchaser of such a lease to object to the title on the ground of liability to unusually onerous covenants not brought to his notice at the time of sale (*o*). And it appears that the purchaser may object to the title on the ground that the covenants in the head lease are more onerous than those in the underlease, and that the land would be forfeitable for breach of such covenants (*p*), unless this objection be precluded by a special condition of sale (*q*), or the purchaser bought with notice of the fact (*r*). The purchaser may also object to the title where the head lease comprises other land than that demised by the underlease, so that the land sold is charged with the whole of the rent reserved by the head lease, and is liable to forfeiture for any breaches of the covenants in the head lease which may be committed by the lessee of the other land (*s*). On the sale of such an underlease, therefore, the vendor must be careful to preclude this objection by a special stipulation (*t*). Where the underlease sold and the superior lease are both determinable by re-entry for non-payment of rent and breach of covenant, it is of course material to the title to show that no cause of forfeiture of either has occurred. And where the head lease includes other lands than those demised by the underlease, it is important to ascertain that no forfeiture of the head lease has been incurred through omission to comply with the head lessee's

Where the covenants in the head lease are more onerous than those in the underlease.

Where the head lease comprises other land than that sold.

Proof of performance of covenants in head lease.

(*m*) Above, pp. 75, 340, 342, 343.
(*n*) *Hayford* v. *Criddle*, 22 Beav. 477.
(*o*) Above, p. 339, and cases cited in n. (*z*) thereto; *Hyde* v. *Warden*, 3 Ex. D. 72.
(*p*) See *Darlington* v. *Hamilton*, Kay, 550, 558, 559.
(*q*) For forms of such a stipulation, see 1 Davidson, Prec. Conv. 647, 4th ed.; 1 Key & Elph. Prec. Conv. 284, 285, 4th ed.; 342, 10th ed.
(*r*) See above, pp. 188, 343-346.
(*s*) *Blake* v. *Phinn*, 3 C. B. 976; *Darlington* v. *Hamilton*, Kay, 550; *Cresswell* v. *Davidson*, 56 L. T. 811; *Re Lloyd's Bank, Ltd. and Lillington's Contract*, 1912, 1 Ch. 601.
(*t*) See note (*q*), above; above, p. 76; Appendix (A), Special Condition 24.

covenants relating to such other lands (*u*). Under the Conveyancing Act, 1881 (*x*), a provision similar to that considered above is implied, in the absence of stipulation to the contrary, in contracts made after the year 1882 for the sale of land held by underlease; the purchaser being bound to assume, unless the contrary appears, on production of the receipt for the last payment due for rent under the underlease before the date of actual completion of the purchase, that all the covenants and provisions of the underlease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date. It has been held that the vendor of an underlease does not comply with this provision by producing a receipt given by the superior landlord for rent paid to him by the vendor under threat of distress; what is required is the receipt for the rent due under the underlease (*y*). Where the receipt for the rent last due under the underlease had been produced, but it appeared that the superior landlord had brought, though he had practically ceased to prosecute, an action to recover possession of the premises on the ground of breach of covenant to repair, it was held that the purchaser must accept, as sufficient proof that the covenants in the superior lease had been performed, an affidavit by the vendor that he had been in possession of the premises without any other disturbance than the above, that he had repaired the premises, and that, to the best of his knowledge and belief, the covenants had been performed (*z*). As already mentioned, it is desirable for a vendor of land held by underlease to stipulate expressly that the last receipt for rent thereunder shall be conclusive evidence of the performance of the covenants and conditions of the underlease and of every superior lease, and also, where necessary, that the giver of the receipt shall be assumed to be the reversioner or his agent (*a*).

(*u*) See *Dewar* v. *Goodman*, 1907, 1 K. B. 612; 1908, 1 K. B. 94; 1909, A. C. 72, deciding that, in case of such a forfeiture, the underlessee has no remedy against the assigns of the underlessor under covenants by him to perform, and to indemnify the underlessee against, the covenants of the head lease relating to other lands than those comprised in the underlease.

(*x*) Stat. 44 & 45 Vict. c. 41, s. 3 (5, 9, 10, 11).

(*y*) *Re Higgins and Percival*, 1888, W. N. 172.

(*z*) *Ringer* to *Thompson*, 51 L. J. Ch. 42.

(*a*) Above, pp. 75, 346.

Sale of leaseholds not assignable without the landlord's licence.

When leaseholds are sold, which are subject to a covenant not to assign without the landlord's licence (*b*), the vendor is bound to procure such licence at his own expense, and if he fail to do this, he will not have shown a good title and will have broken the contract (*c*). But it appears that the procuring of the necessary licence is at first to be treated

(*b*) See Wms. Real Prop. 553-555, 562, 573, 574, 23rd ed. By stat. 55 & 56 Vict. c. 13, s. 3, agreements in leases against assigning or underletting without licence shall, unless the lease contain an express provision to the contrary, be deemed to be subject to a proviso that no fine shall be payable for such licence. It has been held that this enactment does not make the payment of such a fine an illegal payment; so that if a fine be voluntarily paid, it cannot be recovered back. But if the lessor refuse to give the licence except on payment of a fine, the lessee may lawfully assign or underlet without the licence; see *Waite* v. *Jennings*, 1906, 2 K. B. 11; *Jenkins* v. *Price*, 1907, 2 Ch. 229, 233, 234, reversed on other grounds, 1908, 1 Ch. 10; *Andrew* v. *Bridgman*, 1908, 1 K. B. 596; *West* v. *Gwynne*, 1911, 2 Ch. 1. So, if a lease contain a covenant not to assign without the lessor's licence, such licence not to be unreasonably withheld, and the lessor do unreasonably refuse his licence to assign, the lessee may lawfully assign the demised premises without the licence; *Bates* v. *Donaldson*, 1896, 2 Q. B. 241; *Jenkins* v. *Price*, ubi sup. But he has no right of action against the lessor to recover damages for unreasonably refusing the licence; *Treloar* v. *Bigge*, L. R. 9 Ex. 151; *Sear* v. *House Property, &c. Society*, 16 Ch. D. 387. He may, however, bring an action against the lessor for a declaration that he is entitled to assign without licence; *Young* v. *Ashley Gardens, &c.*, 1903, 2 Ch. 112; *Mills* v. *Cannon Brewery Co., Ltd.*, 1920, 2 Ch. 38; *Ideal Film Renting Co.* v. *Nielsen*, 1921, 1 Ch. 575; *Re Winfrey and Chatterton's Agreement*, 1921, 2 Ch. 7; and will, if successful, be entitled to the costs of such an action; *West* v. *Gwynne*, 1911, 2 Ch. 1, 8, 11, 14, 17, overruling (as to costs) *Jenkins* v. *Price*, ubi sup., and *Evans* v. *Levy*, 1910, 1 Ch. 453. The lessee must, however, apply for the lessor's consent, and is not entitled to assign without the lessor's licence unless he has first made such application; see *Ellis* v. *Allen*, 1914, 1 Ch. 904. And if the lessor refuse his consent for good reason (though he do not state his reason) the lessee is not entitled to assign without the lessor's consent, and commits a breach of the covenant if he do so assign; *Goldstein* v. *Sanders*, 1915, 1 Ch. 549. So also where the covenant is not to assign without the lessor's consent, which is not to be withheld in the case of a respectable and responsible person, the lessee is bound to tender to the lessor such a person as the proposed assignee, and will commit a breach of the covenant, if he assign over without doing so; *Ellis* v. *Allen*, ubi sup.; *Cohen* v. *Popular Restaurants, Ltd.*, 1917, 1 K. B. 480. If, however, the lessee do tender such a person as the proposed assignee (and he may tender a limited company as such a person), but the lessor refuse to accept the person proposed, or (as it appears) delay for an unreasonable time to give an answer to the lessee's application, the lessee may either bring an action for a declaration that he is entitled to assign without the lessor's licence (in which action he should succeed with costs), or may assign to the person proposed without the lessor's consent and without first bringing such an action; *Willmott* v. *London Road Car Co., Ltd.*, 1910, 2 Ch. 525; *Lewis & Allenby* (1909), *Ltd.* v. *Pegge*, 1914, 1 Ch. 782.

Covenants not to assign without licence, the licence not to be unreasonably withheld.

Where lessor's consent is not to be withheld in case of a a respectable and responsible person.

(*c*) *Bain* v. *Fothergill*, L. R. 7 H. L. 158; cf. *Lockharts* v. *Bernard Rosen & Co.*, 1922, 1 Ch. 433.

as a matter of conveyance rather than of title (*d*), and the purchaser cannot object to the title on the ground of the absence of any licence to assign, if the vendor procure such licence before the day fixed for completion (*e*). If such property be sold under an express stipulation that the sale is subject to the landlord's approval or to his consent to the assignment, the vendor is still bound to use his best endeavours to procure the necessary licence; and if he do this and the licence be refused, he will be discharged from his contract (*f*). If, on the other hand, he fail to fulfil this duty, he will have broken the contract; and in such case he will be liable to compensate the purchaser in damages for the loss of his bargain (*g*), contrary to the general rule (*h*). Whenever leaseholds subject to a covenant against assignment without the lessor's consent are offered for sale, it should be stated that the property is subject to such covenant (*i*), and it should be expressly stipulated that, if the lessor's consent cannot be obtained, the contract shall be rescinded, the vendor returning the deposit, if any, but not paying the purchaser's expenses of investigating the title or otherwise (*k*). If the person to give the licence to assign should not be the original lessor, the vendor would have to prove that such person was the proper person to give the licence; and as this would involve investigation of the landlord's title, it is better for the vendor to relieve himself by express stipulation of the obligation of giving such proof (*l*). Leaseholds subject to a covenant not to assign without the lessor's licence may be sold and conveyed, without committing any breach of the covenant, either by way

(*d*) See above, pp. 150-153.

(*e*) *Monro* v. *Taylor*, 3 Mac. & G. 713, 714, 722; *Ellis* v. *Rogers*, 29 Ch. D. 661; *Day* v. *Singleton*, 1899, 2 Ch. 320, 327; and see *Smith* v. *Butler*, 1900, 1 Q. B. 694.

(*f*) *Lehmann* v. *McArthur*, L. R. 3 Ch. 496. In *Day* v. *Singleton*, 1899, 2 Ch. 320, 327, 328, there are *dicta* to the apparent effect that the vendor would in such case be liable at law for breach of the contract; but it is submitted that they must be read as referring to an open contract to sell such leaseholds. In that case the sale was expressly made *subject to the landlord's consent to the transference of the lease.* This, it is submitted, would clearly absolve the vendor from breach of the contract at law, if he tried his best but failed to obtain the necessary consent.

(*g*) *Day* v. *Singleton*, ubi sup.

(*h*) Above, p. 36.

(*i*) See above, p. 339.

(*k*) See 1 Davidson, Prec. Conv. 562, 5th ed.; Davidson's Concise Prec. 126, 19th ed.

(*l*) See 1 Key & Elph. Prec. Conv. 343, 344, 10th ed.

of underlease (provided that the covenant do not also prohibit underletting) (*m*), or by any disposition operating as an assignment in equity only and not at law, such as a declaration of trust for the purchaser (*n*). But if the vendor propose to carry out the sale in either of these ways, he must make an express stipulation to that effect, or the purchaser will not be bound to accept the same as a due performance of the contract. If leaseholds be held subject to a covenant by the lessee not to assign without the lessor's licence, which is not to be unreasonably withheld, and the lessee sell them under an open contract, and the landlord refuse to consent to the proposed assignment on grounds which are apparently unreasonable, it appears that the vendor cannot oblige the purchaser to perform the contract specifically by accepting an assignment without the lessor's consent (*o*); for the lessor may have some good reason for refusing it (*p*), and would be at liberty to prove this in an action brought by himself to enforce his right of re-entry for breach of the covenant. The title would therefore be too doubtful for a Court of Equity to force upon an unwilling purchaser (*q*).

Where landlord's consent not to be unreasonably withheld.

Sale of part of land held by lease for years.

If a lessee for years, holding at a rent and subject to lessee's covenants, assign over part of the demised land, the assignee is liable to be distrained upon for the whole of the rent reserved (*r*); although if the lessor sue him personally for the rent, either in debt or on the covenant to pay the rent, he will only be liable to pay an apportioned part of the rent proportionate to the value of the land he holds, as his personal liability to pay the rent arises only from the privity of estate between him and the lessor (*s*). It has been held that, if an assignee of part of land let on lease pay the whole rent reserved by the

(*m*) *Crusoe* d. *Blencowe* v. *Bugby*, 2 W. Bl. 766; *Church* v. *Brown*, 15 Ves. 258, 265.

(*n*) *Gentle* v. *Faulkner*, 1900, 2 Q. B. 267. See also *Horsey Estate, Limited* v. *Steiger*, 1899, 2 Q. B. 79; *Grove* v. *Portal*, 1902, 1 Ch. 727.

(*o*) See above, p. 348, n. (*b*). But of course the vendor would have a good title to assign after he had obtained, in an action against his landlord, a declaration of his right to assign without the landlord's consent.

(*p*) See and consider *Re Spark's Lease*, 1905, 1 Ch. 456; *Jenkins* v. *Price*, 1907, 2 Ch. 229, reversed, 1908, 1 Ch. 10; *Goldstein* v. *Sanders*, 1915, 1 Ch. 549; above, p. 348, n. (*b*).

(*q*) *Re Marshall and Salt's Contract*, 1900, 2 Ch. 202.

(*r*) *Curtis* v. *Spitty*, 1 Bing. N. C. 756, 760; *Hyde* v. *Warden*, 3 Ex. D. 72, 76; see Wms. Real Prop. 68, 365, 23rd ed.

(*s*) *Hare* v. *Cator*, Cowp. 766; *Stevenson* v. *Lambard*, 2 East, 575; *Salts* v. *Battersby*, 1910, 2 K. B. 155.

lease under threat of distress, he cannot assert a right of *contribution* to such payment against an underlessee of the other part of the land, for the right to *contribution* only arises either at law or in equity where both parties are subject to a common liability (*t*). It is submitted, however, that in such case the party so coerced to pay the whole rent is not without remedy. He has paid off a charge upon the whole of the lands comprised in the lease (*u*), and on general principles of equity he should be entitled to the benefit of the charge, and to stand in the lessor's place as against that part of the demised premises which he does not hold himself (*x*). If a lessee for years holding subject to a proviso for re-entry on breach of covenant assign over part of the demised land, the lease remains determinable as to the whole of the demised premises on any breach of covenant; so that the lessor could re-enter upon the assignee for breach of covenant committed after the assignment by the original lessee with respect to the other part of the land (*y*). If, therefore, a tenant for years holding at a rent and subject to lessee's covenants and a proviso for re-entry on breach of covenant sell part of the land leased to him, and represent that the property sold is held at a rent less than that which he has to pay for the whole of the land, the purchaser could object to the title on the ground that the land sold is charged with the whole of the rent, and is subject to forfeiture for breach of covenant committed in respect of the rest of the land leased (*z*). It follows that on a sale of part only of land held on lease for years, special stipulation must be made precluding objection to the title on these grounds, and providing for apportionment of the rent as between

(*t*) *Johnson* v. *Wild,* 44 Ch. D. 146.

(*u*) See above, p. 350, n. (*r*).

(*x*) This view of the question seems to have escaped the notice of the learned counsel for the plaintiff and of the Court in *Johnson* v. *Wild,* ubi sup. It is submitted that the case falls within the principle of the rule that a tenant for life, or any one having a partial interest only in land, who pays off a charge on the inheritance, will be presumed (unless he show a contrary intention) to keep the charge alive for his own benefit; see *Burrell* v. *Egremont,* 7 Beav. 205, 226, 232; Cranworth, C., *Morley* v. *Morley,* 5 De G., M. & G. 610, 620; *Re Harvey,* 1896, 1 Ch. 137; *Giffard* v. *Fitzhardinge,* 1899, 2 Ch. 32; *Re Smith's Settled Estates,* 1901, 1 Ch. 689; *Re Pizzi,* 1907, 1 Ch. 674; and also within the principle of subrogation and perhaps that of marshalling securities; see below, § 10 of this Chapter.

(*y*) *Hyde* v. *Warden,* 3 Ex. D. 72, 76; *Dewar* v. *Goodman,* 1909, A. C. 72; above, p. 347, and n. (*u*).

(*z*) *Hyde* v. *Warden,* 3 Ex. D. 72, 76, 81; see also *Fildes* v. *Hooker,* 3 Madd. 193; Sug. V. & P. 382; above, p. 346, n. (*s*).

Sale of leaseholds in lots.

the vendor and the purchaser (*a*). As already mentioned, when leasehold property is sold in lots, it is usually stipulated that one of the purchasers shall take an assignment of the lease, and the others shall accept underleases either from that purchaser or from the vendor (*b*).

Sale of renewable leaseholds.

Where leaseholds for years perpetually renewable under a covenant in that behalf (*c*) are sold as such, it appears that, in the absence of stipulation to the contrary, the purchaser is entitled to be satisfied that he will obtain, not only the existing term, but also the effective right to renew it for ever. He is in fact buying, not merely the term, but an equitable interest in the fee simple as well (*d*). It is thought therefore that, where the first lease was granted less than forty years before the contract, the purchaser is not precluded by the Vendor and Purchaser Act, 1874 (*e*), from calling for the title to confer the right of renewal, and may require the production, not only of the first lease containing the covenant of renewal and the subsequent title thereunder, but also of the title to the freehold from the granting of the first lease back to the beginning of forty years before the contract (*f*). Where the first lease was granted more than forty years before the contract, it is thought that not more than forty years' title under the leases and the covenant to renew them could be required to be shown, and that such enjoyment would have to be accepted as *primâ facie* evidence that the right of renewal was effectually conferred (*f*). But it

(*a*) See above, p. 76; *Paterson* v. *Long*, 6 Beav. 590.

(*b*) Above, p. 78; 1 Dart, V. & P. 132, 5th ed.; 148, 6th ed.; see 1 Davidson, Prec. Conv. 545, 632, n., 699-701, 4th ed.; ibid. 453, 529, n., 563-566, 5th ed.; 1 Key & Elph. Prec. Conv. 345, and n. (*d*), 10th ed.; Davidson's Concise Precedents, 227, and n. (*a*), 19th ed.

(*c*) Covenants to renew leases for years or lives continually on their expiration for ever are held to be valid and either not to be obnoxious to or to be excepted out of the rule against perpetuities, and may be specifically enforced; see *Ross* v. *Worsop*, 1 Bro. P. C. 281; *Pendred* v. *Griffith*. ib. 314; *Sweet* v. *Anderson*, 2 Bro. P. C. 256; *Iggulden* v. *May*, 9 Ves. 325, 334; *S. C.*, 7 East, 237, 242-245; *Hare* v. *Burges*, 4 K. & J. 45, 57; *Pollock* v. *Booth*, Ir. R. 9 Eq. 229; Jessel, M. R., *London & South Western Ry. Co.* v. *Gomm*, 20 Ch. D. 562, 579; *Swinburne* v. *Milburn*, 9 App. Cas. 844, 850, 853, 855; *Wynn* v. *Conway Corporation*, 1914, 1 Ch. 705; 42 Sol. J. 629, 630 (by the author); Gray, Rule against Perpetuities, §§ 230, 230a, 230aa, 3rd ed. A tenancy from year to year is inconsistent with a right to perpetual renewal; Younger, L. J. (as judge of first instance) in *Gray* v. *Spyer*, 1921, 2 Ch. 549, 561; affirmed, 66 Sol. J. 387.

(*d*) See Jessel, M. R., *Moore* v. *Clench*, 1 Ch. D. 447, 452.

(*e*) Stat. 37 & 38 Vict. c. 78, s. 2, r. 1; above, p. 92.

(*f*) See above, pp. 88-91, 92, 93; 1 Davidson, Prec. Conv. 534, 4th ed.; 443, 5th ed.; Sug. V. & P. 369, 370.

is conceived that the purchaser would be entitled to require proof of some covenant for perpetual renewal entered into forty years at least before the sale; and that if the right of perpetual renewal should depend solely on the original covenant to renew, and not on new covenants to that effect contained in the renewed leases, he would have the right to call for an abstract and production of the instrument containing the original covenant (*g*). In cases of this kind, the renewed lease is usually granted partly in consideration of the surrender of the then existing lease, and where this has occurred within the time for which title can be required to be shown, the purchaser has the right to require proof that the surrenderor was entitled to the entire interest, legal as well as equitable, in the lease surrendered. For if there were anything in that lease to give notice that the surrenderor was a trustee of his interest therein, and consequently of his interest in the renewed lease, the purchaser would take with notice of such trust (*h*). It appears from this that any lease granted in express consideration of the surrender of a prior lease is not in itself a good root of title (*i*). The vendor of leaseholds, which are renewable, whether perpetually or for some definite period, should protect himself by special stipulation against these liabilities (*k*). And it seems that in any case where a lease is sold, which has on the face of it been granted in consideration of the surrender of a former lease, the vendor should make special provision to preclude his being required to prove that the surrenderor was entitled to the whole interest in the lease surrendered (*l*).

Sale of lease granted on surrender of a prior lease.

The reader will remember that under the present law, when the purposes of long terms of years created for securing the

Satisfied terms.

(*g*) See above, pp. 88-93.

(*h*) See *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291; *Hodgkinson* v. *Cooper*, 9 Beav. 304; Sug. V. & P. 369; 1 Dart, V. & P. 291, 5th ed.; 332, 6th ed.; 327, 7th ed.; 1 Davidson, Prec. Conv. 696, n. (*l*), 4th ed.; above, pp. 224 *sqq*.

(*i*) See above, pp. 98-100.

(*k*) See 1 Davidson, Prec. Conv. 696, n. (*l*), 4th ed.; 1 Key & Elph. Prec. Conv. 284, 4th ed.; 341, 10th ed.; Encyclopædia of Forms and Precedents, xii. 344.

(*l*) See authorities cited above, n. (*h*). It appears, however, that if it be expressly stated in the contract or conditions of sale that the lease sold was granted in consideration of the surrender of a prior lease, it would be sufficient to stipulate that the title shall commence with the new lease; see stat. 44 & 45 Vict. c. 41, s. 3 (3); above, pp. 99, n. (*p*), 180 *sq*., 193.

payment of money charged on land have been satisfied, they either cease, where originally limited subject to a proviso for cesser, by virtue of such proviso, or they are made to merge by being assigned or surrendered to the person or persons seised of the freehold in the land subject to the term, or they become attendant upon the inheritance by express declaration or construction of law and thereupon cease and determine under the Satisfied Terms Act, 1845 (*m*). Whenever any land sold has been subject to such a term, it is of course material for the purchaser's counsel to ascertain that it became utterly extinct; and if the date of the term's alleged cesser fall within the period for which title has to be shown, the title to the term down to that date must be abstracted and produced (*n*). It should be borne in mind that cesser under an express proviso does not usually take place unless and until the trustees of the term have been duly reimbursed all their costs and expenses (*o*); and that, in order to effect the merger of a term, it must be surrendered to the person entitled at law in reversion immediately expectant on the term to the freehold or some leasehold (*p*) estate in the land demised (*q*). No merger will take place if the surrenderee were entitled in equity only and not at law, or if another term of years be outstanding between the estates of the surrenderor and the surrenderee (*r*). Whenever a term vested in trustees is intended to be merged, they should themselves surrender it; as the persons equitably interested in the term cannot make any effective assurance of the legal estate therein, and the trustees may have a lien on the term for their costs, which would prevent it from becoming extinct as a satisfied term (*s*). With respect to the cesser under the Satisfied Terms Act, 1845, of terms becoming satisfied after that

Proviso for cesser.

Merger.

Trustees of a term should surrender it themselves.

Cesser under Satisfied Terms Act.

(*m*) Stat. 8 & 9 Vict. c. 112, s. 2; Wms. Real Prop. 413-421, 13th ed.; 585-594, 23rd ed.

(*n*) See *Lyle* v. *Yarborough*, John. 70, 74, 77, 78; Sug. V. & P. 616 *sq.*; 1 Dart, V. & P. 289, 5th ed.; 329, 6th ed.; 326, 7th ed.

(*o*) See 3 Davidson, Prec. Conv. 1165, 1251, n., 1261, 3rd ed.

(*p*) *Hughes* v. *Robotham*, Cro. Eliz. 302; Sug. V. & P. 619.

(*q*) Co. Litt. 337 b; Shep. Touch. 303 *sq.*; 2 Black. Comm. 326; Burton, Comp. 287, 2nd ed.; Sug. V. & P. 617 *sq.*

(*r*) See *Whitchurch* v. *Whitchurch*, 2 P. W. 326; 9 Mod. 124; *Scott* v. *Fenhoullet*, 1 Bro. C. C. 69; *Rooper* v. *Harrison*, 2 K. & J. 86, 110-115; Burt. Comp. 287, 2nd ed.; Sug. V. & P. 625.

(*s*) See Davidson, Prec. Conv. vol. ii. part i. p. 310, n., 4th ed.; cf. Davidson, Prec. Conv. vol. v. part ii. p. 178, 3rd ed., where the point as to costs is not mentioned.

year (*t*), it is to be noted that such terms only are extinguished as have become satisfied and attendant on the inheritance. A term does not become so satisfied and attendant unless the beneficial interest in the whole charge secured by the term and the beneficial interest in the entire freehold estate affected by the term are united in one person, or so long as there remains any useful purpose beneficial to the owner of the term and consistent with the trusts thereof (*u*). And a term is not *satisfied*, so as to cease under the Act, so long as any of the moneys originally secured thereby, including the trustees' costs (*x*), remain unpaid, or if any incumbrance, against which the term would be an effectual protection, be outstanding (*y*). The Act does not apply to a mortgage term created by sub-demise of leaseholds (*z*).

Whether terms subject to rent and lessee's covenants become extinct when acquired by the freeholder.

The rules as to terms becoming satisfied are not applicable to terms granted for the purpose of reserving rent and subject to the performance of lessee's covenants, but questions often arise upon titles whether such terms have been extinguished by reason of the ownership of the term and of the fee simple becoming united in one person; as where the termor has purchased the fee simple or the freeholder the term.

Old law of merger.

Under the common law such a term merged at law if by any means it became vested in the tenant of the freehold in his own right and not *en autre droit* (*a*).

Rules of equity as to merger.

But if in such case merger would be prejudicial to any equitable interest in the term, or the owner had expressed the intention of keeping the term alive,

(*t*) Stat. 8 & 9 Vict. c. 112, s. 2. As to the cesser under that Act of satisfied terms, which were on the 31st Dec. 1845, attendant on the inheritance, and the protection afforded by such terms, see *Doe* v. *Price*, 16 M. & W. 603; *Doe* v. *Mousdale*, ib. 689; *Cottrell* v. *Hughes*, 15 C. B. 532; *Plant* v. *Taylor*, 7 H. & N. 211.

(*u*) *Anderson* v. *Pignet*, L. R. 8 Ch. 180, 188-190.

(*x*) Above, p. 354.

(*y*) See *Doe* d. *Clay* v. *Jones*, 13 Q. B. 774; *Freer* v. *Hesse*, 17 Jur. 177, reversed on other grounds, *ib.* 703, 4 De G., M. & G. 495; *Shaw* v. *Johnson*, 1 Dr. & Sm. 412, 7 Jur. N. S. 1005 (where the dates are given); *Anderson* v. *Pignet*, L. R. 8 Ch. 180, 189; Sug. R. P. Stat. 278-281, 2nd ed.; Sug. V. & P. 626; 1 Dart, V. & P. 507, 508, 5th ed.; 577, 578, 6th ed.

(*z*) *Re Moore and Hulme's Contract*, 1912, 2 Ch. 105; and as to such mortgages, see articles by "H. W. E." in 56 Sol. J. 220, 249.

(*a*) Co. Litt. 338 b; 2 Black. Comm. 177; Sug. V. & P. 617 *sq.*; 1 Wms. Exors. 641, 642, 7th ed.; Wms. Real Prop. 251, 283, 414-416, 13th ed.; 371, 402, 586-589, 23rd ed.

the term would be treated in equity as still subsisting (*b*). On the other hand a term not merged at law would be treated in equity as attendant on the inheritance if the *equitable* ownership of the term and the fee simple became united and an intention of extinguishing the term were expressed or implied (*c*). Thus if the termor contracted to buy the fee simple, or *vice versâ*, it was considered that the term would be extinguished in equity, unless a contrary intention were shown (*d*). But where the intention of keeping the term on foot was expressed, as where the termor took a conveyance of the fee in the name of a trustee for himself and his heirs with a declaration against merger (*e*), or the freeholder in fee took a conveyance of the term to a trustee on trust for himself, his executors, administrators and assigns (*f*), the purchaser's interest in the term remained distinct, in equity as well as at law, from his ownership of the fee simple. Since the commencement of the Judicature Acts (*g*) merger does not take place by operation of law only of any estate, in which the beneficial interest would not be deemed to be merged or extinguished in equity. And since that time, when the owner of the term purchases or takes a conveyance of the fee simple, or *vice versâ*, the term does not merge, if an intention of keeping it on foot be shown, notwithstanding that the term and the inheritance be vested at law in the same person (*h*). And such intention, if not expressly declared, may be implied from the nature of the transaction, or from the acts of the parties either at the time of the transaction or subsequently thereto (*i*). But if

Purchase of fee by termor or of term by freeholder.

Present law as to merger.

(*b*) See *Thorn* v. *Newman*, 3 Swanst. 603; *Nurse* v. *Yerworth*, ib. 608, 618; *Philips* v. *Philips*, 1 P. W. 34, 41; Sug. V. & P. 620, 621; *Chambers* v. *Kingham*, 10 Ch. D. 743; also *Adams* v. *Angell*, 5 Ch. D. 634, 645, 646; and cases cited below, note (*d*).

(*c*) *Whitchurch* v. *Whitchurch*, 2 P. W. 236; 9 Mod. 124; *Goodright* v. *Sales*, 2 Wils. 329, 331.

(*d*) *Capel* v. *Girdler*, 9 Ves. 509; Sug. V. & P. 625, 626; and see *Saxton* v. *Saxton*, 13 Ch. D. 359, and cases there cited.

(*e*) *Belaney* v. *Belaney*, L. R. 2 Ch. 138.

(*f*) *Gunter* v. *Gunter*, 23 Beav. 571.

(*g*) Stat. 36 & 37 Vict. c. 66, s. 25 (4), which commenced on the 1st Nov. 1875; stat. 37 & 38 Vict. c. 83.

(*h*) See *Snow* v. *Boycott*, 1892, 3 Ch. 110; *Ingle* v. *Vaughan Jenkins*, 1900, 2 Ch. 368; *Thellusson* v. *Liddard*, ib. 635; *Capital & Counties Bank, Ltd.* v. *Rhodes*, 1903, 1 Ch. 631; *Lea* v. *Thursby*, 1904, 2 Ch. 57; *Re Gibbon*, 1909, 1 Ch. 367, 373; *Re Fletcher*, 1917, 1 Ch. 339.

(*i*) See cases cited in previous note, especially *Lea* v. *Thursby*, *Re Fletcher*, ubi sup.

no such intention be shown, the term will merge in the freehold, as before the Acts (*k*).

Land held for long term enlarged into fee simple.

Where the land sold was held for a long term of years, which has been enlarged into a fee simple under the Conveyancing Acts, 1881 and 1882 (*l*), and the enlargement has taken place within the period for which the title is to be investigated, the vendor must remember that the deed of enlargement is not in itself a good root of title (*m*), and that, in the absence of stipulation to the contrary, he will be bound to show title to the term down to the date of the enlargement, that is, to abstract and produce the instrument which created the term, and so much of the subsequent title prior to the enlargement as will carry the abstract back to a date at least forty years before the sale (*n*). And he must not forget that it lies on him to prove that the enlargement purported to be made was warranted by the powers given by the Acts (*o*). The purchaser's advisers should see that the vendor's duties in these respects are duly discharged; except of course so far as he is by special stipulation in the contract exonerated from performing them.

Leaseholds settled on trust to go with freeholds.

On the purchase of leaseholds settled on such trusts as shall correspond, as nearly as the rules of law and equity will permit, with the uses declared of some freehold lands assured in strict settlement (*p*), it must not be forgotten that the leaseholds are not thereby converted in equity into real estate (*q*). On the contrary, they remain personal estate and will therefore vest absolutely (subject to any prior life interests) in the person who becomes entitled to the first estate of inheritance, whether in fee or in tail, in the settled freeholds (*r*); unless the settlement contain the usual proviso that the leaseholds shall not vest

(*k*) See *Re Attkins*, 1913, 2 Ch. 619.
(*l*) Stats. 44 & 45 Vict. c. 41, s. 65, amended by 45 & 46 Vict. c. 39, s. 11.
(*m*) See above, pp. 98-100, 192-194.
(*n*) See above, pp. 90-94, 179, 192-194.
(*o*) See Hood & Challis, Conv. and Settled Land Acts, 160 *sq.*, 7th ed.
(*p*) As to this mode of settlement, see Davidson, Prec. Conv. vol. iii., pp. 599-605, 1130, 3rd ed.; vol. iv., p. 435, 3rd ed.; Williams on Settlements, 223.
(*q*) See *Re Walker*, 1908, 2 Ch. 705, 712; *Re Gibbon*, 1909, 1 Ch. 367, 378.
(*r*) See *Foley* v. *Burnell*, 1 Bro. C. C. 274, 4 Bro. P. C. 319; Wms. Pers. Prop. 401, 448-450, 17th ed.; and authorities cited in note (*p*), above.

absolutely in any person thereby made tenant in tail by purchase unless he shall attain the age of twenty-one years, but shall devolve on his death as if they were freeholds of inheritance limited to the uses of the settlement. Such a proviso is only effective if confined to tenants in tail taking by purchase; and does not of course prevent the leaseholds from vesting absolutely in the person who becomes entitled to the first estate tail, if he take by purchase and be of or attain full age, or if he should become entitled thereto by inheritance (whether of full age or not) (*s*). Leaseholds settled in this way do not, of course, require to be disentailed at any time. If a re-settlement be made, they should be assigned, as the absolute property in reversion of the tenant in tail, upon trusts to correspond with the uses declared of the freeholds thereby assured, subject to the above-mentioned proviso (*t*).

Options to purchase contained in leases.

Sometimes leases contain an agreement giving to the lessee, his executors, administrators or assigns, the option of purchasing the freehold from the lessor, his heirs or assigns, either at any time during the continuance of the term or within some shorter period. It must be remembered that covenants of this kind are collateral covenants, not touching or concerning the demised premises as such, and are subject to the same law as options to purchase conferred by agreements independent of leases (*u*).

How far options of purchase are subject to the rule against perpetuities.

Contracts giving options exercisable at any future time (without limit) to purchase land are so far subject to the rule against perpetuities that the Courts will not enforce them specifically against persons not parties to the contract, who have acquired the original contractor's estate by succession after death or by assignment with notice of the contract, in any case where the effect of ordering such specific performance would be to secure to the person entitled to the option a contingent equitable

(*s*) See authorities cited in note (*p*), above, p. 357. Personal chattels such as furniture, pictures, plate and jewels, are governed by the same law when settled on trust to accompany freeholds; see Wms. Pers. Prop. 448-450, 17th ed.; but see *Re Chesham's Settlement*, 1909, 2 Ch. 329, and the late Mr. Charles Sweet's criticism of this decision in 54 Sol. J. 26; *Re Parker*, 1910, 1 Ch. 581; *Re Harcourt*, 1921, 2 Ch. 491.

(*t*) See 2 Key & Elph. Prec. Conv. 710, 715, 4th ed.; 799, 802, 10th ed.

(*u*) *Woodall* v. *Clifton*, 1905, 2 Ch. 257; see an article by the author in 42 Sol. J. 628, 650; and as to the decision of the C. A. in this case, see an article by the author in 49 Sol. J. 547, and one by the late Mr. Charles Sweet in 55 Sol. J. 360; *Re Leeds and Batley Breweries and Bradbury's Lease*, 1920, 2 Ch. 548.

interest in the land, which would not necessarily vest (if at all) within the period allowed by the rule (*x*). It has been held, however, that such agreements are not void at law as contracts, but are enforceable by action for damages in case of their breach (*y*). And it has been considered that contracts of this kind are specifically enforceable against the original contractor, even though made by a corporation enjoying immortal existence (*z*). The result is that, to be perfectly effective, options to purchase land must be limited so as to be exercisable only within some period not exceeding that allowed by the rule against perpetuities, namely, the duration of some specified life or lives in being at the date of the contract giving the option and twenty-one years thereafter (*a*), and this is equally the case where the contract is contained in a lease as where it is not. If therefore the lease be for a term exceeding twenty-one years and the option be for the lessee, his executors, administrators or assigns, to purchase of the lessor, his heirs or assigns, at any time during the term, the option is only partially effective. It would be specifically enforceable against the lessor himself, or (as it appears) by the lessee himself against the lessor's heirs or assigns: but not by the lessee's assigns against the lessor's assigns (*b*).

Reversionary leases.

Where the landlord of a tenant for a term of years has granted to him a new lease to commence in reversion upon the expiration of the existing term, it must not be forgotten that during this term the tenant has only an *interesse termini*, and

(*x*) *London & South Western Ry. Co.* v. *Gomm*, 20 Ch. D. 562, 580 *sq.*; and see *South Eastern Ry. Co.* v. *Associated Portland, &c., Ltd.*, 1910, 1 Ch. 12, 28-34, the decision in which case is criticised by the author in 54 Sol. J. 471, 501.

(*y*) *Worthing Corpn.* v. *Heather*, 1906, 2 Ch. 532. An appeal was entered against this decision, but the case was compromised. The decision in this case is criticised by the writer in 51 Sol. J. 648, 669, where it is respectfully submitted that agreements of this kind are in general or unlimited restraint of alienation, and ought to be treated as void on that account; see also another article by the author on this subject in 54 Sol. J. 471, 501.

(*z*) *South Eastern Ry. Co.* v. *Associated Portland, &c., Ltd.*, 1910, 1 Ch. 12, 28-34. This decision is criticised by the author in 54 Sol. J. 471, 501.

(*a*) See Wms. Real Prop. 439-441, 23rd ed.; and the author's article on the Rule against Perpetuities in the Encyclopædia of the Laws of England, 2nd ed.

(*b*) See *Woodall* v. *Clifton*, 1905, 2 Ch. 527; *Worthing Corpn.* v. *Heather*, 1906, 2 Ch. 532; and the author's articles in 42 Sol. J. 630, 650; 51 Sol. J. 648, 669, 670.

no *term*, under the new lease; he is not tenant for one term made up by adding the years to be enjoyed under the new lease to the existing term. If, therefore, the tenant should have underlet for a period exceeding the existing term, he will in effect have assigned his interest in the term, and will have no reversion enabling him to distrain for the rent reserved by the underlease (*c*). Terms of years may of course be limited to commence at a future time (*d*); and no period was defined by the ancient common law within which such terms should be required to take effect (*e*). But in the last century the question was raised in certain text-books whether terms to commence *in futuro* were well limited if they might take effect at some time exceeding the period allowed by the rule against perpetuities (*f*). And for some time the trend of judicial opinion on this subject (*g*) was such as to cast a doubt on the validity of terms limited to commence at a future time beyond that period. It has, however, now been decided that the *interesse termini* conferred by a lease for years to commence at a future date is, not an executory interest, but is an interest vested immediately in the lessee, who thereby acquires at once a right available against all the world to the future possession of the demised premises; and that for this reason the lease is not void if the term granted be limited to begin more than twenty-one years after the date of the deed of lease, and no life or lives be therein specified during which the term must arise (*h*).

Terms to commence *in futuro*.

Mann, Crossman and Paulin v. *Land Registry* (*Registrar*).

(*c*) *Lewis* v. *Baker*, 1905, 1 Ch. 46; *Llangattock* v. *Watney, &c., Ltd.*, 1910, 1 K. B. 236; affirmed, 1910, A. C. 394; *Knight* v. *City of London Brewery Co.*, 1912, 1 K. B. 10, 15; see Wms. Real Prop. 551, 552, 570, 23rd ed.

(*d*) Wms. Real Prop. 395, 13th ed.; 550, 23rd ed.

(*e*) See *Smith* v. *Day*, 2 M. & W. 684; 3rd Rep. of Real Property Commrs. 29, 31; Encyclopædia of the Laws of England, xi. 72, 73, 2nd ed. (by the author).

(*f*) See 1 Sand. Uses, 197, 199, 4th ed.; Lewis on Perpetuities, 600, 609, 614; Gray on Perpetuities, §§ 299-303, 314, 316, 319, 3rd ed.

(*g*) See North, J., *Dunn* v. *Flood*, 25 Ch. D. 629; Baggallay, L. J., *S. C.*, 28 Ch. D. 592; *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540 (these opinions are criticised below, Chap. XII. § 3); Farwell, L. J., *South Eastern Ry. Co.* v. *Associated Portland, &c., Ltd.*, 1910, 1 Ch. 12, 27 (as to which case and *dictum*, see above, p. 359, n. (*z*)); and the author's article on the Rule against Perpetuities in the Encyclopædia of the Laws of England, vol. ii. pp. 72, 73, 2nd ed.

(*h*) *Mann, Crossman & Paulin* v. *Land Registry* (*Registrar*), 1918, 1 Ch. 202, where the lease granted was reversionary, to commence on the expiration of an existing lease for a term of which there were more than twenty-one years to run. It may be noted that similar reversionary leases had been granted and allowed to pass unchallenged in the Courts in *Llangattock* v. *Watney, &c., Ltd.*, 1910, 1 K. B. 236; A. C. 394;

§ 3.—*Sale of lands in a register county or compulsory registration district.*

Lands in Middlesex or Yorkshire.

If the property purchased be situate in Middlesex or Yorkshire (including the town and county of Kingston-upon-Hull), the conveyancer must, of course, have regard, in advising on title, to the law established by the Registry Acts (*i*) for those counties, and to the construction placed on the Middlesex and the old Yorkshire Registry Acts in Courts of Equity with regard to purchasers having notice of prior unregistered assurances (*k*). He should note, in perusing the abstract, whether every document which ought to be registered has been duly registered, and, if not, he should require the vendor to procure the same, if still capable of registration, to be registered at the vendor's expense (*l*). If the omission to register cannot be rectified, the purchaser's counsel must consider whether the circumstances are such as prevent his client from obtaining an indefeasible legal estate in the property purchased, and he should make requisitions or objections as to the title, according to the conclusion at which he arrives. With regard to dispositions taking effect *inter vivos*, the general effect of the Middlesex and old Yorkshire Registry Acts was that an unregistered deed or con-

Effect of unregistered assurances.

and *Knight* v. *City of London Brewery Co.*, 1912, 1 K. B. 10; see Neville, J., 1918, 1 Ch. 209.

(*i*) Stats. 7 Anne, c. 20, for Middlesex, of which the register was transferred to the Land Registry Office by 54 & 55 Vict. c. 64; 2 & 3 Anne, c. 4; 6 Anne, c. 20 (5 Anne, c. 18, in Ruffhead), for the West Riding of Yorkshire; 6 Anne, c. 62 (c. 35 in Ruffhead), for the East Riding and Kingston-upon-Hull; and 8 Geo. II. c. 6, for the North Riding. All the Yorkshire Acts were repealed and replaced by 47 & 48 Vict. c. 54, amended by 48 & 49 Vict. c. 26.

(*k*) See Wms. Real Prop. 222, 278, 550, 631, 23rd ed.; 2 Dart, V. & P. 678-685, 852-857, 5th ed.; 767-776, 958-965, 6th ed.; 697-705, 865-872, 7th ed.; Brickdale on Registration in Middlesex.

(*l*) Sug. V. & P. 546. The memorial to be registered in Middlesex or Yorkshire of any deed was required to be under the hand and seal of some or one of the grantors or grantees, his or their heirs, executors or administrators, guardians or trustees, and to be attested by two witnesses, whereof one should be one of the witnesses to the execution of the deed; Sug. V. & P. 729, 730. The Yorkshire Registries Act, 1884, s. 6, substituted *parties to the deed* for *grantors or grantees* and *one or more* for *two* witnesses. In Middlesex, the memorial is now required to be attested by one witness only, such witness, *where practicable*, to be a witness to the execution of the deed; stat. 54 & 55 Vict. c. 64, s. 2, and First Schedule, r. 2; Land Registry (Middlesex Deeds) Rules, 1892, r. 6; W. N. 13th Feb. 1892. It is sufficient if a witness to the execution of the deed by the grantee attest the memorial; *R.* v. *Registrar for Middlesex*, 21 Q. B. D. 555. In default of compliance with these conditions the registration is void; *Essex* v. *Baugh*, 1 Y. & C. C. C. 620.

veyance of lands in either of these counties was voidable at law by a subsequent registered deed or conveyance of the same lands to a purchaser or mortgagee for valuable consideration (*m*). But an unregistered assurance by deed was not void or inoperative; it passed the legal estate to the grantee, and was only defeasible by such a registered assurance as above described (*n*). Thus, if A. granted the same lands by unregistered deed first to B. and subsequently to C., whether for value or not, and C. by registered deed granted the lands to D. on a sale or mortgage, D. did not thus obtain the legal estate or any priority of interest over B. For when A. granted the lands to C., he had already parted with all his estate therein to B., and A.'s grant to C., being unregistered, could not operate to displace B.'s estate (*o*). If, however, the conveyance from A. to C. were duly registered, as well as that from C. to D., D. would obtain the legal estate, whether he had or had not notice of the conveyance from A. to B. (*p*); but if he had such notice, *in equity* he would obtain no priority of interest over B., and would be a trustee of his legal estate for B.'s benefit (*q*). It has been

(*m*) Stats. 2 & 3 Anne, c. 4, s. 1; 6 Anne, c. 62 (c. 35 in Ruffhead), s. 1; 7 Anne, c. 20, s. 1; 8 Geo. II. c. 6, s. 1. These enactments required the registration of "all deeds and conveyances whereby any hereditaments may be in any way affected at law or in equity"; and it was held that these words extend to a written memorandum of an agreement giving or operating as a charge in equity upon certain lands; *Neve* v. *Pennell*, 2 H. & M. 170, 185-187; *Credland* v. *Potter*, L. R. 10 Ch. 8; but not to the charge created by a deposit of title deeds without agreement or memorandum in writing; *Sumpter* v. *Cooper*, 2 B. & Ad. 223; or to a vendor's lien arising without express agreement in writing; *Kettlewell* v. *Watson*, 26 Ch. D. 501, 507; or to the vesting, effected by an adjudication of bankruptcy, of the bankrupt's estate in his trustee; *Re Calcott and Elvin's Contract*, 1898, 2 Ch. 460. Considering these decisions, it would appear that the words above quoted are wide enough to include an unsealed memorandum in writing of a contract to sell land, Brady, Ir. C., *Gardiner* v. *Blesinton*, 1 Ir. Ch. Rep. 79, 85; but see and consider *Inland Revenue Commrs.* v. *Angus*, 23 Q. B. D. 579; *Rodger* v. *Harrison*, 1893, 1 Q. B. 161. The law stated in this note now applies to lands in Middlesex only; see below, p. 364, and n. (*b*).

(*n*) Grant, M. R., *Jones* v. *Gibbons*, 9 Ves. 407, 411.

(*o*) *Jack* d. *Rennick* v. *Armstrong*, 1 Hud. & B. 727; *Fury* v. *Smith*, ib. 735: both cases on the Irish Registry Act; 2 Dart, V. & P. 855, 856, 5th ed.; 963, 964, 6th ed.; 871, 872, 7th ed.

(*p*) *Doe* d. *Robinson* v. *Allsop*, 5 B. & A. 142.

(*q*) *Le Neve* v. *Le Neve*, Amb. 436; 2 White & Tudor, L. C. Eq. 187, 8th ed. As a rule, actual notice of a previous unregistered assurance was necessary to deprive a purchaser of the benefit of registration; *Wyatt* v. *Barwell*, 19 Ves. 435. He would not lose his priority through not making investigations or inquiries for unregistered documents; *Agra Bank, Limited* v. *Barry*, L. R. 7 H. L. 135; *Lee* v. *Clutton*, 45 L. J. Ch. 43, 46 L. J. Ch. 48. But if his solicitor or agent

decided by the House of Lords, in a case upon the Irish Registry Act, that in order to avoid an unregistered assurance it is not necessary that the subsequent registered conveyance should be made by the first grantor personally; it may be made by anyone who, but for the unregistered assurance, would take his estate by operation of law in his lifetime (*r*). And in the same case the English judges, who were called in to advise the House, unanimously expressed the opinion (*s*) that a secret conveyance of a man's lands made by unregistered assurance may be avoided by a registered conveyance from his heir, or even from his devisee (*t*) to a purchaser.

Wills. Wills of lands in Middlesex or Yorkshire, if not registered within six months of the testator's death, were voidable by a registered conveyance from the testator's heir to a purchaser (*u*); so that the devisee under a will not so registered could not make a good title to the devised lands without the heir's concurrence (*x*). But under the Vendor and Purchaser Act, 1874 (*y*), where such a will has not been registered within due time, an assurance of the land to a purchaser or mortgagee by the devisee, or by someone deriving title under him, shall,

had actual notice, such notice would be imputed to him; *Rolland* v. *Hart*, L. R. 6 Ch. 678. Registration of an assurance is not of itself equivalent to notice thereof; *Morecock* v. *Dickins*, Amb. 678; *Re Russell Road Purchase Moneys*, L. R. 12 Eq. 78, 83. But if one search in the register, he is affected with notice of registered assurances; *Bushell* v. *Bushell*, 1 Sch. & Lef. 90, 103; *Hodgson* v. *Dean*, 2 Sim. & Stu. 221, 225; *Procter* v. *Cooper*, 1 Jur. N. S. 149.

(*r*) *Warburton* v. *Loveland*, 2 Dow & C. 480, where a woman entitled to a term of years settled it on her marriage by unregistered assurance, and it was held that this settlement must be postponed to a registered assignment of the term by her husband to a purchaser.

(*s*) 2 Dow & C. 495.

(*t*) Assuming, it is presumed, that the will was duly registered; see Dart, V. & P. 683, 684, 5th ed.; 772, 6th ed.; 701, 7th ed. The rule subsequently laid down by Mr. Dart and his editors (p. 855, 5th ed.; 963, 6th ed.; 871, 7th ed.), that a purchaser under an unregistered conveyance can only be disturbed by a purchaser from the first grantor or parties taking under him by *act in law*, does not appear to be quite accurately expressed, as a devisee is the testator's assign.

(*u*) That is, if the testator died in Great Britain. Three years were given for registration from the death of a testator dying upon or beyond the seas. In case of an impediment to the registration of the will, a memorial of the impediment might be registered and the will might be registered within six months after the removal of the impediment. See stats. 7 Anne, c. 20, ss. 1, 8, 9; 2 & 3 Anne, c. 4, ss. 1, 20, 21; 6 Anne, c. 35, ss. 1, 14, 15, 34; 8 Geo. II. c. 6, ss. 1, 15, 16; *Chadwick* v. *Turner*, 34 Beav. 634, L. R. 1 Ch. 310.

(*x*) 2 Dart, V. & P. 682, 683, 5th ed.; 771, 772, 6th ed.; 701, 7th ed.

(*y*) Stat. 37 & 38 Vict. c. 78, s. 8.

if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law. It is not clear to what extent this enactment is retrospective. On a sale of lands in Middlesex by the devisees under an unregistered will of a testator, who died in 1875, subject to the condition that no objection should be taken on account of any document not being registered in Middlesex, the purchaser was obliged to take the title, notwithstanding that it was unknown who was the heir, and search against the heir's name was thus prevented (*z*).

Yorkshire Registries Act, 1884.

The Yorkshire Registries Act, 1884 (*a*), provides that all assurances (as defined in the Act) (*b*) affecting lands in Yorkshire *may be* registered under the Act, and that all assurances entitled to be registered under this Act shall have priority according to the date of registration (*c*), and that all priorities given by this Act shall have full effect in all Courts, except in cases of actual fraud, and all persons claiming thereunder

(*z*) *Girling* v. *Girling*, W. N. 1886, p. 18.

(*a*) Stat. 47 & 48 Vict. c. 54, ss. 4, 14, as amended by 48 & 49 Vict. c. 26, s. 4.

(*b*) By stat. 47 & 48 Vict. c. 54, s. 3, in this Act, unless the context otherwise requires, the expression *assurance* shall include any conveyance, enlargement of term into fee simple, memorandum of charge, deed of consent to the discharge of a trustee, statutory receipt, private Act of Parliament, award or order of the Land Commissioners, order of a Court, certificate of appointment of a trustee in bankruptcy, or affidavit of vesting under any Act of Parliament; and the expressions *conveyance* (which is confined to certain conveyances made by deed), *enlargement of term into fee simple, memorandum of charge, statutory receipt, award or order of Land Commissioners* and *order of a Court* (which includes writ of execution and adjudication in bankruptcy), are also elaborately interpreted. The powers of the Land Commissioners were in 1889 transferred to the Board of Agriculture, styled in 1903 the Board of Agriculture and Fisheries, and now replaced by the Ministry of Agriculture and Fisheries; see above, pp. 133, n. (*z*), 134, n. (*b*), 139. By sect. 7 of the Act, the charge given by a vendor's lien or a deposit of title deeds is required to be accompanied by a registered memorandum in order to give priority over subsequent registered assurances for valuable consideration. It has been held that a written memorandum of a contract for the sale of land in Yorkshire, subject to the conditions implied by law that the vendor shall show a good title and convey on acceptance of the title, and payment of the price, is not an assurance within the meaning of this Act; *Rodger* v. *Harrison*, 1893, 1 Q. B. 161.

(*c*) By stat. 48 & 49 Vict. c. 26, s. 3, a *caveat* in favour of any person may be registered with respect to any lands in Yorkshire by any person claiming to be entitled to any interest therein; and if, while the *caveat* remains in force, an assurance of the lands from the giver of the *caveat* to the other, his representatives or assigns, be duly registered, such assurance shall have priority as though it had been registered on the date of registration of the *caveat*.

any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud (*d*). This Act appears to have the same effect as the Acts which it repealed (*e*), with respect to the operation of conveyances *inter vivos* at law (*f*); but to abolish the doctrine as to notice applied in equity to the old Acts (*g*). Under the Act of 1884 (*h*), wills of lands in Yorkshire have priority according to the date of the testator's death, if registered or entitled to rank as registered, within six months thereafter (*i*); and if registered later, according to the date of registration. But the Act provides (*k*) for the registration at any time after, but not before, the expiration of six months from a landholder's death of an affidavit of his intestacy, and gives priority, where such an affidavit has been registered, to any duly registered assurance for valuable consideration by any person entitled to execute the same in case of such intestacy, over any will of the supposed intestate which shall be subsequently registered, and shall not be entitled to rank as registered within six months after the testator's death.

Exceptions.

The Middlesex Registry Act and the old Yorkshire Registry Acts do not extend to copyhold estates, leases at a rack rent, or leases not exceeding twenty-one years when the actual possession and occupation go along with the lease (*l*). And the Middlesex Registry Act does not extend to Chambers in Serjeants' Inn, the Inns of Court or Inns of Chancery (*m*), and has no application to the City of London (*n*). The Yorkshire

(*d*) See *Battison* v. *Hobson*, 1896, 2 Ch. 403.
(*e*) Above, p. 361, n. (*i*).
(*f*) Above, p. 361.
(*g*) Above, p. 362. This doctrine remains in force with regard to lands in Middlesex.
(*h*) Stat. 47 & 48 Vict. c. 54, ss. 4, 14, amended by 48 & 49 Vict. c. 26, s. 4.
(*i*) If the will cannot be registered within six months after the testator's death, notice of the will may be registered within the same period, and in such case the will, if registered within two years after the testator's death, will have priority as though it were registered on the date of registration of the notice; stat. 47 & 48 Vict. c. 54, s. 11.
(*k*) Sect. 12.
(*l*) Stats. 7 Anne, c. 20, s. 17; 2 & 3 Anne, c. 4, s. 16; 6 Anne, c. 35, s. 29; 8 Geo. II. c. 6, s. 34.
(*m*) Stat. 7 Anne, c. 20, s. 17.
(*n*) Sug. V. & P. 732. Lands taken in 1888 from Middlesex to make up the *county* of London remained subject to the jurisdiction of the Middlesex Registry: stat. 51 & 52 Vict. c. 41, ss. 40, 96.

Registry Act, 1884 (*o*), does not extend to copyholds, or to any lease not exceeding twenty-one years, or any assignment thereof, where accompanied by actual possession from the making of such lease or assignment; and the Act does not apply to land in the city of York (*p*). It has been held that, under the old Yorkshire Registry Acts, it was not necessary to register an assignment by deed of a pecuniary legacy charged on land in Yorkshire (*q*); and that, under the Middlesex Registry Act, registration need not be made of a conveyance of an interest in the proceeds of sale of land devised in trust for sale (*r*). And the same rule has been applied, under the present Yorkshire Registry Acts, to the mortgage of an interest in the proceeds of sale of land settled by deed on trust for sale (*s*). Here we may note that the non-registration of wills of leaseholds does not appear to be an objection to the title thereto (*t*), as, when a will of leaseholds has been proved, there is no one, like the heir of freeholds, who could possibly convey them to a purchaser so as to defeat the executors' or legatees' title (*u*). And pending probate, the leaseholds could only be lawfully disposed of to the prejudice of those claiming under the will by an administrator duly appointed on the supposition of intestacy; in which case the validity of the administrator's dealings therewith would appear to depend on the general law (*x*) and not on the policy of the Registry Acts. It may be observed that since the descent of the legal estate in freeholds has been assimilated to that of chattels real (*y*), it is in most cases, if not in all (*z*), impossible

Wills of leaseholds.

(*o*) Stat. 47 & 48 Vict. c. 54, s. 28.

(*p*) This was equally the case with the old Yorkshire Registry Acts.

(*q*) *Malcolm* v. *Charlesworth*, 1 Keen, 63, doubted in Davidson, Prec. Conv. vol. ii., part 2, p. 219, 4th ed., but approved by Kay, J., in *Arden* v. *Arden*, 29 Ch. D. 702, and by the C. A. in *Gresham Life Assurance Socy.* v. *Crowther*, 1915, 1 Ch. 214.

(*r*) *Arden* v. *Arden*, ubi sup.

(*s*) *Gresham Life Assurance Socy.* v. *Crowther*, 1914, 2 Ch. 219; 1915, 1 Ch. 214.

(*t*) See 2 Dart, V. & P. 683, 5th ed.; 772, 6th ed.; 702, 7th ed.

(*u*) Besides this reason, the provisions of the Middlesex and old Yorkshire Registry Acts for registration of wills of lands appear inapplicable to leaseholds, the memorial being required to be the act of the devisee: see stat. 54 & 55 Vict. c. 64, First Sched. r. 3. The Yorkshire Registries Act, 1884, s. 6, permits registration of a will by the executor.

(*x*) See above, p. 218.

(*y*) Above, pp. 211, 213.

(*z*) Title must now be made through the administrator in case of intestacy: above, p. 213. But if the existence of a will were not discovered for some years after the testator's death, and the adminis-

for an heir of freehold lands in Middlesex or Yorkshire to convey the same to a purchaser so as to defeat the title of an executor or devisee under an unregistered will. Lands situate within the jurisdiction of the Middlesex Registry, or any of the Yorkshire Registries, become exempt from such jurisdiction on being registered under the Land Transfer Acts, 1875 and 1897, and no document relating to such lands and executed after such registration, and no testamentary instrument relating to such lands and coming into operation after such registration, need be registered in the county register (*a*). But this provision does not apply to estates and interests excepted from the effect of registration under a possessory or qualified title (*b*), or to an unregistered reversion on a registered leasehold title, or to dealings with incumbrances created prior to the registration of the land (*c*). If any such lands so registered in the Land Registry should afterwards be removed therefrom, they will again become subject to the jurisdiction of the county register as from the date of removal (*d*).

Lands registered in the Land Registry.

Where the land purchased is situate in a district in which registration of title is compulsory on sale, it must be remembered that under the Land Transfer Act, 1897 (*e*), any conveyance on sale (*f*) executed on or after the day on which registration of title on sale was made compulsory in that district (*g*), does not pass the legal estate in any freehold land

Lands in a district where registration of title is compulsory on sale.

trator had conveyed to the heir (see above, pp. 213, 216) and the heir to a purchaser, both by duly registered deed, it appears that in Middlesex the purchaser's title would prevail over that of the devisee, as in *Chadwick* v. *Turner*, L. R. 1 Ch. 310. So, also, in Yorkshire, if an affidavit of intestacy had been registered (see above, p. 365); if not, *quære*.

(*a*) Stat. 38 & 39 Vict. c. 87, s. 127; 54 & 55 Vict. c. 64, First Sched. § 14; Land Transfer Rules, 1908, I. r. 48.

(*b*) See stat. 38 & 39 Vict. c. 87, ss. 8, 9; Wms. Real Prop. 707, 23rd ed.

(*c*) Stat. 60 & 61 Vict. c. 65, First Sched.

(*d*) Stat. 60 & 61 Vict. c. 65, s. 17 (3).

(*e*) Stat. 60 & 61 Vict. c. 65, s. 20 (1, 2); *Capital & Counties Bank, Ltd.* v. *Rhodes*, 1903, 1 Ch. 631, 654.

(*f*) "Sale" in this enactment appears to be confined to sale strictly so called (see above, pp. 1, 251), and not to extend to transactions in which other valuable consideration than the payment of a price in money is given for the conveyance of land, such as exchange, partition, mortgage and marriage or family settlement, and of course not to voluntary gifts.

(*g*) By Orders in Council dated the 18th July and 20th Oct. 1898, 28th Nov. 1899, 9th March and 10th Dec. 1901, and 6th March, 1902 (W. N. 23rd July and 29th Oct. 1898, 9th Dec. 1899, 23rd March and

situate in that district to the person entitled thereunder unless or until he is registered as proprietor of the land. The expression "conveyance on sale" here means an instrument executed on sale (*h*) by virtue whereof there is conferred or completed a title under which an application for registration as first proprietor of land may be made under the Land Transfer Act, 1875 (*i*). This provision, however, does not apply in the case

21st Dec. 1901, and 15th March, 1902), registration of title was made compulsory on sale in the following districts comprising the county and city of London on the dates mentioned below:—

DISTRICTS.	Days of commencement of Compulsory Registration.
The parishes of Hampstead, St. Pancras, St. Marylebone and St. George's, Hanover Square	1st Jan. 1899.
The parishes of Shoreditch, Bethnal Green, Mile End Old Town, Wapping, St. George's in the East, Shadwell, Ratcliff, Limehouse, Bow, Bromley and Poplar	1st March, 1899.
The parishes of Christ Church, Southwark, St. George the Martyr, Camberwell, Horsleydown, Lambeth, Bermondsey, Newington, Rotherhithe, St. Olave and St. Thomas, St. Saviour and the detached part of the parish of Streatham situate between the parishes of Lambeth and Camberwell	1st Jan. 1900.
The parishes of Battersea, Clapham, Putney, Tooting Graveney, Wandsworth, and the remainder of the parish of Streatham	1st May, 1900.
The remainder of the county of London (except the city)	1st Nov. 1900.
The city of London	1st July, 1902.

It should be noted, however, with regard to the city of London, that an Order of Council making registration compulsory was actually in force from the 1st until the end of the 5th day of March, 1902; and it appears that conveyances executed during that time on sale of lands there situate are governed by the law so introduced: see the Orders of 10th Dec. 1901, and 6th March, 1902, cited above. As to conveyances executed on or after the 6th March, 1902, it appears that the last-mentioned Order in Council, being in effect the execution of a power of legislation conferred by statute, would take effect from the first instant of that day, and would operate as a revocation of the previous Order: see stat. 60 & 61 Vict. c. 65, s. 20 (1, 3); *Tomlinson* v. *Bullock*, 4 Q. B. D. 230.

(*h*) See note (*f*), above, p. 367.

(*i*) Stat. 60 & 61 Vict. c. 65, s. 20 (2). To be entitled to make such an application, a person must have contracted to buy, or be entitled at law or in equity to, or be capable of disposing by way of sale of, an estate in fee simple in the land for his own benefit, whether subject to incumbrances or not; and if he apply as purchaser the

of the conveyance on sale of an incorporeal hereditament, or mines and minerals apart from the surface, or an undivided share in land, or freeholds intermixed with and indistinguishable from lands of other tenure, or corporeal hereditaments parcel of a manor (*k*) and included in the sale of a manor as such; for nothing in the Act is to render compulsory the registration of the title to such hereditaments (*l*). And as regards land situate in a district where registration is compulsory, an assignment on sale of a lease or underlease having at least forty years to run or two lives yet to fall in, and a grant of a lease or underlease for a term of forty years or more, or for two or more lives, executed after the day on which registration was made compulsory in that district, and capable of registration (*m*), operates only as an agreement, and does not pass any legal estate to the assignee or lessee unless or until he is registered as proprietor of the lease or underlease (*n*). The expressions "assignment" and "grant of a lease or underlease" here apply to any instrument by virtue whereof there is conferred or completed a title under which an application for registration as first proprietor of leasehold land may be made, not being an assignment or

Leaseholds.

vendor must consent to the application; or he must hold the land on trust for sale, or be a trustee, mortgagee, or other person having power of sale thereof (including a tenant for life or other person having the power of sale given by the Settled Land Acts), and the persons (if any) whose consent is required to the exercise of the trust or power of sale must consent to the application; or any two or more persons must be entitled for their own benefit, concurrently or successively, or partly in one mode and partly in another, to such estates, rights, or interests in the land as would if vested in one person entitle him to be registered as proprietor: stats. 38 & 39 Vict. c. 87, ss. 5, 68, 69; 60 & 61 Vict. c. 65, ss. 6, 14 (1), and First Schedule; Wms. Real Prop. 698, 699, 709, 710, 23rd ed.

(*k*) This includes lands held of the manor as copyhold or as customary freehold where the freehold is in the lord, but not lands held of the manor by free tenure: Wms. Real Prop. 459, 460, 505-509, 23rd ed.; Williams on Seisin, 30.

(*l*) Stat. 60 & 61 Vict. c. 65, s. 24.

(*m*) See note (*o*) below, p. 370, as to what leases are capable of registration.

(*n*) Land Transfer Rules, 1903, r. 69, further providing that, where the assignees or lessees shall be the trustees of a settlement for the purposes of the Settled Land Acts, 1882 to 1890, or any of them, nothing in this rule shall prevent the legal estate in the land from passing to the trustees, provided that the tenant for life or person having the powers of a tenant for life under the settlement be registered as proprietor of the land comprised in the assignment or lease within one calendar month from the date thereof, or within such further time as the registrar shall allow. See stat. 60 & 61 Vict. c. 65, s. 6; Wms. Real Prop. 709, 23rd ed.

surrender to the owner of the immediate reversion executed on or after the 1st of January, 1909, and containing a declaration that the term is to merge in such reversion (*o*). A term created for mortgage purposes is not capable of registration under the Land Transfer Acts (*p*), so that the above provisions do not affect the grant of such a term. And it appears that they do not affect an assignment on sale of a term originally created for mortgage purposes, for the "assignment" mentioned therein must confer or complete a title under which an application for registration as first proprietor of leasehold land may be made, and the owner of a term *created* for mortgage purposes is not entitled to make such an application. Here it may be noticed that the exact scope of the expression "term created for mortgage purposes" is doubtful. It certainly includes the term created on a mortgage of leaseholds by demise, but it is questionable whether it extends to a term limited by a settlement to trustees on the usual trusts to raise portions for younger children, such trusts being to raise the portions not only by mortgage, but also by sale of timber or minerals, or out of the rents and profits, or by any other reasonable means (*q*).

Term created for mortgage purposes.

If on the purchase of land situate in a district where registration is compulsory, title be deduced under a conveyance on sale, or a grant or an assignment of a lease, which is affected by the above provisions, it must be ascertained that the purchaser, lessee, or assignee, was duly registered as proprietor of the land, or the legal estate must be required to be got in from the vendor, lessor, or assignor or his representatives, and the title thereto

Title deduced subsequently to an occasion requiring registration.

(*o*) Land Transfer Rules, 1903, r. 70, as amended by L. T. R., 1908, V. The conditions required to entitle a person to make such an application are the same as in the case of freehold land (above, p. 368, n. (*i*)), except that for an estate in fee simple there is substituted any leasehold land held under a lease which is either immediately or mediately derived out of land of freehold tenure and is for or determinable on a life or lives or for a term of years of which more than twenty-one are unexpired; but a term created for mortgage purposes is not to be deemed a lease within the meaning of these provisions, and nothing in the Land Transfer Act, 1897, is to render compulsory the registration of the title to a lease having less than forty years to run or two lives yet to fall in: stats. 38 & 39 Vict. c. 87, ss. 2, 11; 60 & 61 Vict. c. 65, ss. 14, 24, and First Schedule; Land Transfer Rules, 1903, 51-67; L. T. R., 1908, I. 18, II., III.; Wms. Real Prop. 698, 735, 23rd ed.

(*p*) Stat. 60 & 61 Vict. c. 65, First Schedule.

(*q*) See Wms. Real Prop. 692, 693 and n. (*l*), 23rd ed.; 45 Sol. J. 357.

required to be deduced accordingly. And if the land should not have been registered since registration was made compulsory in the district, it must be remembered that the purchaser must himself be registered as proprietor of the land before he can acquire the legal estate on completion of the purchase. The expense of such registration will apparently fall on the purchaser, in the absence of special stipulation, under the general principle that the purchaser must bear the expense of the conveyance to himself of the property sold (*r*). It appears, however, that in the absence of special stipulation it is the vendor's duty to procure the purchaser to be registered as proprietor; for the general rule is that the vendor must *make* the conveyance—*i.e.*, do all acts necessary to pass the legal estate—though the purchaser must pay for the conveyance (*s*); and in the present

First registration.

(*r*) Sug. V. & P. 561; Dart, V. & P. 707, 5th ed.; 798, 6th ed.; 714, 7th ed.

(*s*) See below, Chap. XII., §§ 1, 5; Chap. XX. It is submitted that the case is not parallel to that of the conveyance of land in a register county, when the legal estate passes by the deed of conveyance: above, pp. 361, 362. In L. Q. R. xx. 97, the learned reviewer of the first edition of this book challenged the correctness of the statement in the text, and compared the case to that of a tenant in tail selling the fee simple, when (he suggested) the duty of enrolling a conveyance made by way of disentailing assurance rests on the purchaser. With great respect for this opinion, the author is constrained to adhere to the view above expressed; and he submits that the case of a sale by a tenant in tail is different. The effect of stat. 3 & 4 Will. IV. c. 74, ss. 15, 41, appears to be that the grantee of an estate in fee simple under a disentailing deed executed by the tenant in tail obtains the legal estate in fee simple on the execution of the deed, subject to a condition subsequent reducing the assurance, in case of non-enrolment within due time, to such a conveyance as the tenant in tail could make at common law; see *Whitmore-Searle* v. *Whitmore-Searle*, 1907, 2 Ch. 332. And even at common law the grantee would take a fee simple defeasible by the entry of the issue in tail: *Doe* d. *Neville* v. *Neville*, 7 T. R. 276; *Doe* d. *Gregory* v. *Whichelo*, 8 T. R. 211, 214; Wms. Real Prop. 113 and n. (*u*), 23rd ed. Besides, the fact that the tenant in tail is bound to pay the costs of enrolment (below, Chap. XII. § 4), appears to show that the duty of *procuring* the enrolment (as being an act without which he cannot convey the estate he has sold and so a step in the vendor's title) really lies on the vendor. So in the case of the sale of land in a compulsory registration district it is submitted that the registration of the purchaser is an act without which the vendor cannot convey to the purchaser the estate contracted for, and is equally a step in the vendor's title to convey what he has contracted to sell (see above, p. 88). But the main point is that in this case (unlike that of a purchase from a tenant in tail or of land in a register county) the purchaser can only obtain an equitable estate by the conveyance to him by deed of the land sold, and holds therefore, prior to the completion of his title by registration, subject to all equitable interests (if any) created previously to his own in the property purchased, whether he has notice of such prior interests or not (see below, § 10 of this chapter). It is

case the legal estate cannot pass until registration. For the same reasons, it does not appear that the vendor can claim payment of the purchase money before the purchaser's registration, the rule being that payment can only be demanded on conveyance of the estate (*s*). When unregistered land situate in a compulsory district is sold, the vendor generally desires that the purchase money shall be paid on the execution by him of a deed of conveyance in the old form, which, of course, only passes an equitable estate to the purchaser, and that the purchaser shall then complete his title by registering himself. But to obtain this it appears necessary to make special stipulations to that effect in the contract for sale. It is also desirable, in the vendor's interest, to stipulate that the purchaser *shall* procure the registration of the title within a specified time, in order that the legal estate and any liabilities attached to the legal ownership of the land may not remain outstanding in the vendor for an indefinite period. This is especially necessary where the vendor of leasehold land situate in a compulsory registration district is himself an assignee of the lease, under which the property is held; as he remains subject to the rent and covenants of the lease until he has parted with the legal estate in the term granted (*t*). Forms of the special stipulations appropriate on the sale by auction of unregistered land situate in a compulsory registration district are given in the Appendix (*u*). The purchaser of such land may lodge at the Office of Land Registry a priority notice in favour of his application to be registered as first proprietor thereof; and if within fourteen days after the lodgment of the notice, or such further time as the registrar shall think fit, an application shall be made in accordance with the notice and accompanied by the official acknowledgment of the notice, it will be dealt with in priority to any other application affecting the same land which may have been made in the meantime (*x*). Where a purchaser of unregistered land situate in a compulsory registration district desires to make an immediate disposition thereof by way of registered transfer or charge,

Sale of leaseholds in compulsory district.

Priority notice in favour of the purchaser's application for first registration.

submitted that he cannot be obliged to part with his purchase money against a conveyance of this kind, unless he be bound by express stipulation to do so.

(*s*) See previous note.

(*t*) See Wms. Real Prop. 557, 558, 23rd ed.

(*u*) Appendix A., Special Condition 12, below.

(*x*) Land Transfer Rules, 1903, 95.

he is under the Land Transfer Rules, 1903 (*y*), enabled to do so before he is himself registered as proprietor: but a question has been raised whether such a transfer or charge will convey any legal estate or interest if the purchaser be not himself registered as proprietor of the land (*z*). It appears, therefore, that any one who proposes to take a registered transfer or charge from such a purchaser should insist on the purchaser being registered as proprietor before the intended transfer or charge is completed; and this is especially necessary where the registration of the proprietorship of the land is to be made with possessory title only. The subject of a purchase to be followed by an immediate mortgage of unregistered land, which is situated in a compulsory registration district, is considered in the chapter on the sale of registered land (*a*).

Registered transfer or charge by the purchaser before his own registration.

It is a question whether registration of the title is necessary to pass the legal estate on the completion of the last of several successive purchases of undivided shares (together making the entirety) of unregistered land situate in a compulsory registration district. The enactment as to compulsory registration applies to every instrument executed on sale whereby a title to apply for first registration is conveyed *or completed:* but nothing in the Act is to render compulsory the registration of the title to an undivided share in land (*b*). There seems to be no doubt that the conveyance by deed on purchase of an undivided share in unregistered land situate in a compulsory registration district passes the legal estate, so long as there is not conferred or completed by virtue thereof a title to apply for first registration of something more than an undivided share in land. Thus, if A. be the owner of one-half of Blackacre, and the other half belong to X., and B. purchase A.'s moiety, it seems clear that a deed of grant by A. of his moiety to B. in fee simple would pass the legal estate therein to B. Then suppose that after this B. purchase X.'s moiety, and X. convey it to him by deed, is B. obliged to register his title to this moiety in order that he may acquire the legal estate therein? This can only be necessary if the deed can rightly be described as

Successive purchases of several undivided shares.

Conveyance on purchase of an undivided share alone.

Purchase of undivided shares from different owners.

(*y*) Rule 96; see below, Chap. XX.; Wms. Real Prop. 710-718, 724, 735, 23rd ed.
(*z*) Brickdale & Sheldon, Land Transfer Acts, 396, 397, 2nd ed.
(*a*) Below, Chap. XX. at end.
(*b*) Above, p. 369.

an instrument by virtue whereof there is completed in B. a title to apply for registration in respect of some property, which is not an undivided share in land. But this does not appear to be the case. B.'s title to apply for registration in respect of the moiety purchased from A. was entirely completed when A. conveyed it to him (*c*); so that the deed of grant from X. to B. could only complete B.'s title, which was *conferred* by the contract of sale, to be registered as proprietor of X.'s moiety. And it seems clear that, in any case, non-registration of B.'s title to X.'s moiety could not possibly avoid or impair the legal estate, which B. had already obtained in A.'s moiety. If so, how can it be necessary for B. to register his title to X.'s moiety, as a condition precedent to his obtaining the legal estate therein, when it is expressly enacted that nothing contained in the Land Transfer Act, 1897, shall render compulsory the registration of the title to an undivided share in land (*d*)? If B. were obliged to register his title to X.'s moiety in order to gain the legal estate, then it certainly would be compulsory to register the title to an undivided share in land.

Successive purchases of undivided shares from the owner of the entirety.

If this reasoning be right, there seems to be no difference between the example given and the case where A. is the owner of the whole of Blackacre and B. buys of him (say) nine-tenths for 900*l*. and afterwards contracts to purchase the remaining tenth for 100*l*. And it appears that the deed of grant of the remaining tenth would only complete B.'s title to be registered as proprietor of that tenth, and would not confer on or complete in him any title to be registered as proprietor of the nine-tenths which he bought under a separate and prior contract. In the absence, however, of any judicial decision on these points, it would hardly be safe to accept a title depending on the conveyance by deed alone of the remaining undivided share or shares to one who was already seised of some undivided share in unregistered land situate in a compulsory registration district (*e*). Thus if, in either of the examples given, B. omitted

(*c*) See stat. 60 & 61 Vict. c. 65, s. 14 (1), allowing the registration of undivided shares in land.

(*d*) Stat. 60 & 61 Vict. c. 65, s. 24; above, p. 369.

(*e*) The argument in favour of the necessity of registration would be that by the conveyance of the last remaining share the title to apply for registration in respect of the whole property is completed. But even if this be admitted, it is difficult to see how registration of title could be required to pass the legal estate in that share, without depriving of all meaning the proviso that the Act is not to render com-

to register his title to the share last conveyed to him, it would not be satisfactory for a purchaser from him to accept his title to the entirety of Blackacre without submitting the question of his being seised of the whole legal estate to the decision of the Court; though the purchaser would have to pay the costs of the application if the Court should decide in favour of the title. If in the cases put, the conveyance of the remaining half or tenth share were taken to the use of a trustee in fee simple in trust for B., there would be further ground for contending that the legal estate would pass without registration of the title; for there would then be no merger of the undivided shares acquired by B.; his title to registration as beneficial owner of the half or tenth share last acquired would remain separate and distinct from his title as legal owner of the other moiety or nine-tenth shares; and there would not at any time have been completed in him one title of the same kind (such as tenancy of the legal estate in fee simple) to apply for the first registration of the entirety of the land. But in this case also it would scarcely be prudent for a purchaser from B. to accept the title without a judicial decision in its favour. If, however, it should be held that in these instances the conveyance of the undivided share last assured passes the legal estate without registration of the title, it would be difficult to maintain that there is any difference in the case where a contract to buy the whole of Blackacre at one price is by mutual assent completed by the conveyance of one-half on Monday and of the other half on Tuesday. It is true that in this case (unlike the others) a title to apply for registration in respect of the whole of Blackacre is *conferred* by the contract for sale, so that it may well be argued that this title is *completed* by the conveyance of the second moiety (*f*). But it appears that in this case also the conveyance of the moiety first assured would irrevocably pass the legal estate therein to the purchaser (*g*). If then he should be obliged to register his title to the second moiety in order to acquire the legal estate therein, the Act would (contrary to its own express words) render compulsory the registration of the title to an undivided share in land (*h*).

Completion of a contract to buy the entirety by successive conveyances of undivided shares.

pulsory the registration of the title to an undivided share in land. For it seems impossible to contend that, to effect this result, registration of the title to *the whole* property would be necessary.

(*f*) See above, pp. 368, and n. (*i*), 374, n. (*e*).

(*g*) Above, p. 373.

(*h*) See above, pp. 373, 374, n. (*k*). In the second edition of this

Lands forming part of Bedford Level.

Conveyances of lands forming part of the great level of the Fens called Bedford Level are valid, although not registered in the Bedford Level Office, for all purposes except for entitling the grantees to the privileges conferred by the Bedford Level Act (*i*) on the owners of such lands and for the other purposes of the Act (*k*).

§ 4.—*Voluntary conveyances.*

Voluntary conveyances—

Voluntary conveyances, and conveyances revocable by the grantor, of any estate in lands or other hereditaments were liable to be defeated (*l*), before the 29th of June, 1893 (*m*), by a subsequent conveyance thereof by the grantor (*n*) for any valuable consideration; but this doctrine was not applied to voluntary conveyances in favour of a charity (*o*). And if the grantee under the voluntary conveyance disposed of the lands for valuable consideration the voluntary conveyance could no longer be so defeated by the grantor (*p*). Voluntary conveyances of lands, and also of goods, are voidable if they tend to defeat or delay creditors, as against the grantor's creditors seeking to take the lands or goods in execution in his lifetime, or to make the same applicable in payment of his debts after his death, or as against the trustee in the event of his bankruptcy (*q*). And voluntary conveyances of any property are

In favour of a charity—

Tending to defeat or delay creditors.

Schemes for avoiding registration of title in a compulsory district.

book (pp. 387, 392) a discussion was inserted of certain schemes for avoiding registration of the title on the sale of land situate in a compulsory registration district. This discussion has been omitted in the present edition, as time has shown that in practice any resort to such schemes has been exceedingly rare.

(*i*) Stat. 15 Car. II. c. 17.

(*k*) *Willis* v. *Brown*, 10 Sim. 127.

(*l*) Under the judicial construction of stat. 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18, s. 31, and avoiding conveyances made with intent to defraud subsequent purchasers; see Sug. V. & P. 712 *sqq.*; 2 Dart, V. & P. 889 *sq.*, 5th ed.; 1003 *sq.*, 6th ed.; 914 *sq.*, 7th ed.; Wms. Real Prop. 79, 23rd ed.

(*m*) The date of the passing of the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), providing that voluntary conveyances, if in fact made *bonâ fide* and without any fraudulent intent, should no longer be deemed fraudulent within the meaning of stat. 27 Eliz. c. 4, or be defeated thereunder.

(*n*) Not by his heirs or assigns: *Doe* d. *Newman* v. *Rusham*, 17 Q. B. 723; *Lewis* v. *Rees*, 3 K. & J. 132, 150; unless actually fraudulent: see Sug. V. & P. 713; 2 Dart, V. & P. 902, 5th ed.; 1021, 6th ed.; 931, 7th ed.

(*o*) *Ramsay* v. *Gilchrist*, 1892, A. C. 412.

(*p*) *Prodgers* v. *Langham*, 1 Sid. 133; Sug. V. & P. 719, 720; 2 Dart, V. & P. 901, 5th ed.; 1019, 6th ed.; 929, 7th ed.

(*q*) Stat. 13 Eliz. c. 5; *Twyne's Case*, 3 Rep. 81 a; 1 Smith, L. C. 1; *Richardson* v. *Smallwood*, Jac. 552; *Re Ridler*, 22 Ch. D. 74; 2 Dart,

voidable under the Bankruptcy Act, 1914 (*r*)—as they were under the Bankruptcy Act, 1883 (*s*)—as against the trustee in the grantor's bankruptcy, if the grantor become (*t*) bankrupt within two years thereafter; and such conveyances are further so voidable if the grantor become (*t*) bankrupt within ten years thereafter, unless it can be shown that at the time of making the conveyance he was able to pay all his debts without the aid of the property so conveyed, and that his interest in such property passed to the grantee on the execution of the conveyance. But if the grantee under the voluntary conveyance dispose of the lands or goods to a *bonâ fide* purchaser for valuable consideration, the purchaser's title cannot be displaced by the creditors or trustee in bankruptcy of the maker of the voluntary conveyance (*u*). And this is the case, although the purchaser had notice that the conveyance was voluntary, and even where the purchase was made after the act of bankruptcy but in good faith and without notice of that act (*x*). It was held that, on a voluntary assignment of leaseholds subject to the payment of rent and performance of onerous covenants, the liability so

Bankruptcy within two or ten years thereafter.

Voluntary conveyance of leaseholds.

V. & P. 905-910, 5th ed.; 1024-1030, 6th ed.; 934-942, 7th ed.; Williams on Settlements, 362, 363; see *Re Johnson*, 20 Ch. D. 389; *Re Holland*, 1902, 2 Ch. 360; *Maskelyne* v. *Smith*, 1903, 1 K. B. 671.

(*r*) Stat. 4 & 5 Geo. V. c. 59, s. 42 (1).

(*s*) Stat. 46 & 47 Vict. c. 52, s. 47. Under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 91, voluntary conveyances by *traders* were similarly voidable. Voluntary conveyances were not so voidable under sect. 125 (6) of the Act of 1883 if the grantor died insolvent, but not bankrupt, and his estate was administered in bankruptcy after his death: *Ex parte Official Receiver, re Gould*, 19 Q. B. D. 92. And it appears that the same construction must be placed on sect. 130 (5) of the Act of 1914; see below, § 7 of this chapter, note on the construction of Consolidation Acts.

(*t*) A debtor *becomes* bankrupt at the exact moment of time when he commits the act of bankruptcy (if only one) on which a receiving order is subsequently made against him, or the first of several acts of bankruptcy, which shall be proved to have been committed by him within three months before the presentation of the bankruptcy petition on which such an order shall be made: stat. 4 & 5 Geo. V. c. 59, s. 37, replacing 46 & 47 Vict. c. 52, s. 43, amended by 53 & 54 Vict. c. 71, s. 20; Wright, J., *Re Reis*, 1904, 1 K. B. 451, 455 (whose judgment on this point is not affected by the overruling of his decision on the main question in the case; see *S. C.*, 1904, 2 K. B. 769; 1905, A. C. 442); *Ponsford, Baker & Co.* v. *Union of London & Smiths Bank*, 1906, 2 Ch. 440; *Re Bumpus*, 1908, 2 K. B. 330; *Re Hart*, 1912, 3 K. B. 616.

(*u*) See *Halifax Joint Stock Banking Co.* v. *Gledhill*, 1891, 1 Ch. 31, as to stat. 13 Eliz. c. 5; and as to the Bankruptcy Act, 1883, *Re Vansittart*, 1893, 2 Q. B. 377; *Re Brall*, ib. 381; *Re Carter and Kenderdine's Contract*, 1 Ch. 776.

(*x*) *Re Hart*, 1912, 3 K. B. 6.

incurred by the assignee was sufficient consideration to save the assignment from being defeated by a subsequent assignment for value (*y*); but this liability does not preserve a voluntary assignment of leaseholds from avoidance by the assignor's creditors or trustee in bankruptcy (*z*). Where title is made under a voluntary conveyance, followed by a conveyance for valuable consideration made by the grantee, the mere fact that the voluntary conveyance was voidable in the interval is not an objection to the title (*a*). But the purchaser is, as we have seen (*b*), entitled to require evidence that the voluntary conveyance was not avoided by a subsequent conveyance for valuable consideration made before 29th June, 1893, or otherwise: though after long continued possession in accordance with the title under the voluntary conveyance, it will be presumed that it was not so avoided (*c*). Similarly, where title is made under the avoidance prior to the 29th of June, 1893, of a voluntary conveyance by a subsequent conveyance by the grantor for valuable consideration, it does not appear to be a fatal objection that, in the interval, the voluntary conveyance may have ceased to be defeasible (*d*); but the purchaser is entitled to require evidence that it did not so cease to be defeasible, though this would be presumed from long continued possession under the title given by the avoiding conveyance for value. Since voluntary conveyances have ceased to be defeasible by subsequent conveyances for valuable consideration, it has been held that a grantee of lands under a voluntary conveyance may oblige a purchaser from him to perform the contract specifically, as the purchaser will obtain a title paramount to the claims of the creditors or trustee in bankruptcy of the maker of the voluntary conveyance (*e*).

Proof that a voluntary conveyance has not been avoided.

(*y*) *Price* v. *Jenkins*, 5 Ch. D. 619; *Harris* v. *Tubb*, 42 Ch. D. 79.

(*z*) *Ex parte Hillman, re Pumfrey*, 10 Ch. D. 622; *Re Ridler*, 22 Ch. D. 74.

(*a*) *Noyes* v. *Paterson*, 1894, 3 Ch. 267. (*b*) Above, p. 121.

(*c*) *Re Marsh and Earl Granville*, 24 Ch. D. 11, 19.

(*d*) 2 Dart, V. & P. 999, 5th ed.; 1119, 6th ed.; 1033, 1034, 7th ed. Before the Voluntary Conveyances Act, 1893 (above, p. 376, n. (*m*)), if a man agreed to sell lands with the intention of defeating a voluntary conveyance thereof previously made by him, the Court would not enforce the specific performance of the contract against an unwilling purchaser at the vendor's suit: *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 281; *Clarke* v. *Willott*, L. R. 7 Ex. 313; see *Peter* v. *Nicholls*, L. R. 11 Eq. 391, depending on very peculiar circumstances. But the Court would specifically enforce the contract at suit of the purchaser: *Buckle* v. *Mitchell*, 18 Ves. 100; *Rosher* v. *Williams*, L. R. 20 Eq. 210.

(*e*) *Re Carter and Kenderdine's Contract*, 1897, 1 Ch. 776; above, p. 377.

Liability to estate duty after a voluntary conveyance.

Under the Finance Act, 1894 (*f*), as amended by the Finance (1909—10) Act, 1910 (*g*), if a voluntary conveyance be not made *bonâ fide* three years before the grantor's death, or if *bonâ fide* possession be not assumed by the grantee under a voluntary conveyance immediately upon the making thereof, and thenceforward retained, to the entire exclusion of the grantor, or of any benefit to him by contract or otherwise, or if a voluntary conveyance reserve a life interest or power of revocation to the grantor, estate duty will be payable at his death in respect of the property conveyed (*h*). If, however, any property taken under such a conveyance would be so chargeable with estate duty by reason only that it was not, as from the date of the conveyance, retained to the entire exclusion of the grantor and of any benefit to him by contract or otherwise, it will not be chargeable with estate duty if subsequently, by means of the surrender of the benefit reserved or otherwise, it is enjoyed to the entire exclusion of the grantor and of any benefit to him by contract or otherwise for three years prior to his death (*i*). Purchasers of lands from the grantees under voluntary conveyances should have regard to this liability, and require to be satisfied that the grantor lived for three years (*k*) at least after the making of the voluntary conveyance, or (if

(*f*) Stat. 57 & 58 Vict. c. 30, ss. 1, 2 (1 *c*); see below, Chap. XXI. § 3.

(*g*) Stat. 10 Edw. VII. c. 8, s. 59 (1), substituting the period of three years for that of twelve months (the period originally specified in the Act of 1894) with regard to grantors dying on or after the 30th April, 1909, but not applying to any voluntary conveyance made before the 30th April, 1908, or made or effected for public or charitable purposes. By sub-sect. 2, the enactments making gifts *inter vivos* so chargeable with estate duty are not to apply to gifts which are made in consideration of marriage, or which are proved to the satisfaction of the Inland Revenue Commissioners to have been part of the normal expenditure of the deceased and to have been reasonable, having regard to the amount of his income or to the circumstances, or which, in the case of any donee, do not exceed in the aggregate 100*l.* in value or amount. Estate duty is not payable under the above enactment in respect of property which has been the subject of a *bonâ fide* bargain and conveyance for valuable consideration, though the consideration given be less than the full value of the property; *Re Weir and Pitt*, 55 Sol. J. 536.

(*h*) *A.-G.* v. *Milne*, 1914, A. C. 765, recognizing that in the above circumstances estate duty is payable, but deciding that, where the voluntary conveyance was made by way of settlement, settlement estate duty was not payable. This duty is now abolished; stat. 4 & 5 Geo. V. c. 10, s. 14.

(*i*) Stat. 10 Edw. VII. c. 8, s. 59 (3).

(*k*) Or if the conveyance was made before the 30th April, 1908, for one year; see note (*g*) above.

not) that the estate duty (which falls upon the grantee) has been discharged, and also that the conveyance was not attended by any other circumstance which would make the lands chargeable with estate duty (*l*). Since the passing of the Finance Act, 1894, many voluntary conveyances have been made with the object of escaping the liability to pay estate duty on the grantor's death. Under the Finance (1909—10) Act, 1910 (*m*), every conveyance operating as a voluntary disposition *inter vivos* and executed on or after the 29th of April, 1910, is chargeable with the like stamp duty as if it were a conveyance on sale (*n*), with the substitution of the value of the property conveyed for the amount or value of the consideration for the sale; and the stamp must be adjudicated.

Stamp duty on voluntary conveyances.

(*l*) See *A.-G.* v. *Earl Grey*, 1898, 1 Q. B. 318, 2 Q. B. 534; 1900, A. C. 124.

(*m*) Stat. 10 Edw. VII. c. 8, s. 74 (1, 2) (passed 29th April, 1910). This section does not apply to a conveyance operating as a voluntary disposition of property to a body of persons incorporated by a special Act, if that body is by its Act precluded from dividing any profit among its members and the property conveyed is to be held for the purposes of an open space or for the purposes of its preservation for the benefit of the nation. And by sub-sect. 6, a conveyance made for nominal consideration for the purpose of securing the repayment of an advance or loan, or made for effectuating the appointment of a new trustee, or the retirement of a trustee, whether the trust is expressed or implied, or under which no beneficial interest passes in the property conveyed, or made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust, expressed or implied, or a disentailing assurance not limiting any new estate other than an estate in fee simple in the person disentailing the property, shall not be charged with duty under this section, notwithstanding that the circumstances exempting the conveyance from charge under this section are not set forth therein. By sub-sect. 5, any conveyance (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance operating as a voluntary disposition *inter vivos*, and (except where marriage is the consideration) the consideration for any conveyance shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that, by reason of the inadequacy of the sum paid as consideration or other circumstances, the conveyance confers a substantial benefit on the person to whom the property is conveyed. But where land has been conveyed as on sale for a substantial sum of money, and the conveyance stamped with *ad valorem* duty on that sum, a *subsequent* purchaser may accept that conveyance as sufficiently stamped, and cannot object to the stamp as insufficient on the ground that that sum was not the full value of the land and stamp duty was payable under the above section on such full value; *Re Weir and Pitt*, 55 Sol. J. 536.

(*n*) That is, where the value of the property conveyed does not exceed 500*l*. and the instrument of conveyance contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value of the property conveyed

§ 5.—*Sale of ground rents, reversions and remainders, mines, roads, rivers, &c.*

Purchase of ground rents.

The property commonly described as freehold or leasehold ground rents is nothing else than the freehold or leasehold reversion expectant on the determination of a building lease (*o*); and the purchaser of a freehold or leasehold ground rent described as such is entitled to have conveyed to him such a freehold or leasehold reversion expectant on a lease reserving a ground rent (*p*) as will enable him to distrain and pursue the other usual lessor's remedies for recovery of the rent (*q*). The points to be attended to on behalf of the purchaser of such property are, first, to see that he gets the reversion on the lease, so as to be enabled to enforce all the lessor's remedies, whether by distress, action on the lessee's covenants, or re-entry, for non-payment of the rent reserved and breach of the lessee's covenants; and secondly, to ascertain that the vendor has been in actual receipt of the rents, the right to which constitutes the profitable part of the thing sold. Whether the first of these requirements is fulfilled will of course appear from the usual investigation of the documentary title; the second is necessary to ensure that the purchaser is not getting a paper title and nothing more. The title which ought to be abstracted on the purchase under an open contract of a reversion expectant on a lease for years has been already shown (*r*). If the lease be more than forty years old, the title to the reversion, if freehold, must

Ground rent.

exceeds 500*l.*, at the rate of 6*d.* for every 5*l.* or fraction thereof up to 25*l.*, 2*s.* 6*d.* for every 25*l.* or fraction thereof up to 300*l.*, and above 300*l.*, 5*s.* for every 50*l.* or fraction thereof; and in all other cases at double those rates; see stats. 54 & 55 Vict. c. 39, ss. 1, 14, 54-61, and First Schedule; 58 Vict. c. 16, Part II.; 10 Edw. VII. c. 8, s. 73; Wms. Real Prop. p. 675, n. (*p*), 23rd ed.; below, Chap. XII. § 3. Voluntary conveyances made by deed executed before the 29th April, 1910, were subject to a stamp duty of 10*s.* only; stat. 54 & 55 Vict. c. 39, s. 1, and First Schedule, tit. Deed, replacing 33 & 34 Vict. c. 97, s. 3, and Schedule.

(*o*) *Maundy* v. *Maundy*, 2 Str. 1020.

(*p*) Ground rent properly means the rent at which land is let for the purpose of improvement by building. Thus, it conveys the idea of something less than the rack rent, and a purchaser of a ground rent described as such without further explanation will not be compelled to accept a rack rent: *Stewart* v. *Alliston*, 1 Mer. 26; *Bartlett* v. *Salmon*, 6 De G., M. & G. 33, 41; 1 Dart, V. & P. 123, 5th ed.; 138, 6th ed.; 135, 7th ed. As to what is rack rent, see 2 Black. Comm. 43; *Re C. R. Sawyer and Withall*, 1919, 2 Ch. 333.

Rack rent.

(*q*) *Lecoy* v. *Mogford*, 2 Jur. N. S. 1084; *Langford* v. *Selmes*, 3 K. & J. 220; *Evans* v. *Robins*, 8 Jur. N. S. 846; cf. *Smith* v. *Watts*, 4 Dr. 338.

(*r*) Above, pp. 91, 94.

be carried back so as to show that the lease was well granted. If the reversion sold be leasehold, the title should of course commence with the lease, under which the reversion is derived (*s*). The vendor of a reversion on a lease is under no obligation to deduce the title under the lease so as to prove who is the assignee thereof or person entitled thereunder at the time of sale; it is sufficient if he show that there is a person in possession paying to him the rent reserved on the lease (*t*). The purchaser should of course inquire who is in possession of the property demised under the lease on which he is purchasing the reversion, and should ask the person so ascertained to be in possession as to the extent of his interest in the property (*u*), and also whether he has been paying rent to the vendor. If such person be not the actual occupant of the property, inquiry should be made of the occupant as to the nature of his interest in the property, and to whom he pays rent (*x*). A tenant or occupant is not bound to answer any inquiry to whom he pays his rent (*y*): but where the inquiry is made in connection with the purchase of the reversion, the information sought is in most cases not likely to be withheld. If it should be refused, it is submitted that the vendor would be bound to furnish some other evidence of his receipt of the rent sold. This is merely equivalent to the duty of a vendor of land in possession to produce land corresponding with that described in the contract for sale (*z*); and it is obvious that for the purchaser to dispense with such evidence would be to run the risk of the vendor's title having been extinguished by payment of the rent for twelve years or more to some person wrongfully claiming to be entitled to the land in reversion (*a*).

Inquiries on purchase of the reversion on a lease.

(*s*) Above, p. 93.

(*t*) *Flint* v. *Woodin*, 9 Hare, 618, 621.

(*u*) If he omit this, he will take with notice of such interest: see *Hunt* v. *Luck*, 1901, 1 Ch. 45, 49; Chap. XII., § 2, below.

(*x*) If the occupant should not be paying rent to the vendor's tenant, the inquiry should be pursued until all the links of the chain between the vendor and the occupant have been discovered.

(*y*) *Hunt* v. *Luck*, 1901, 1 Ch. 45, 53.

(*z*) See above, pp. 33, 40.

(*a*) Stats. 3 & 4 Will. IV. c. 27, ss. 9, 34; 37 & 38 Vict. c. 57, ss. 1, 9; see *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328, 355-359; *Williams* v. *Pott*, L. R. 12 Eq. 149. But in the case of mere non-payment of the rent for twelve years or more the vendor's title will not have been affected, though the arrears recoverable will be limited: see *Grant* v. *Ellis*, 9 M. & W. 113, 126, 127; *Archbold* v. *Scully*, 9 H. L. C. 360, 375; Wms. Real Prop. 640, 642, and n. (*h*), 23rd ed. As to the case in which a good title has been acquired under the Statute of Limitations as against the lessee, see *Walter* v. *Yalden*, 1902, 2 K. B. 304.

Where the reversion in fee simple on a lease for years is sold free from incumbrances as a property to be immediately enjoyed and without any special stipulation as to payment of succession duty, and it turns out that the property will be subject to a liability to pay succession duty on the expiration of the lease (*b*), the vendor must (if he can) procure the duty to be commuted at his own expense, or the purchaser will be at liberty to reject the title (*c*); and the purchaser is not obliged to accept the vendor's covenant of indemnity against this liability, however small it may be (*d*). Whenever it appears, on the investigation of the title to lands let at a ground rent, that succession duty has become payable since the commencement of the lease, the purchaser's advisers should be careful to ascertain whether the Crown's claim has been entirely satisfied or whether the duty payable in respect of the increased value to accrue on the determination of the lease has been left outstanding till then (*e*). When the reversion on a lease at a ground rent is subject to such a liability and is proposed to be sold, special stipulation must be made, if it be intended that the purchaser shall himself discharge the duty to become payable on the expiration of the lease (*f*).

Sale of land leased for years, where succession duty payable at end of lease.

Purchaser should ascertain whether any duty so remains payable.

A liability at one time incident to the determination of a lease or an underlease for a term, which originally exceeded twenty-one years, was reversion duty. This duty was imposed by the Finance (1909—10) Act, 1910 (*g*), but it was abolished by the Finance Act, 1920 (*h*), and all sums paid in respect of it were made repayable. Reversion duty was a Crown debt payable (*i*) by the person in whom the lessor's interest was

Reversion duty.

(*b*) Where a succession consists of a beneficial interest in possession in lands let at a ground rent by a lease not granted by the successor himself, the succession duty in respect of the increased value accruing on the determination of the lease need not be paid till then; stat. 16 & 17 Vict. c. 51, s. 20; see below, Chap. XXI. § 2.

(*c*) *Re Kidd and Gibbon's Contract*, 1893, 1 Ch. 695.

(*d*) *Re Weston and Thomas's Contract*, 1907, 1 Ch. 244; see below, Chap. XII. § 4.

(*e*) See the three preceding notes.

(*f*) See Appendix (A), Special Condition 23, for a form of such a condition.

(*g*) Stat. 10 Edw. VII. c. 8, s. 13.

(*h*) Stat. 10 & 11 Geo. V. c. 18, s. 57.

(*i*) Except in the following cases:—(1) Where in the case of a reversion to a lease purchased before the 30th April, 1909, the lease on which the reversion was expectant determined within forty years of the date of the purchase; provided that this exemption did not apply where the lease was determined within forty years by agreement

vested immediately before the expiration of the term for which the lease was granted, or if the lease had determined before that time (as by surrender or merger), immediately before the transaction or event in consequence of which the lease had determined (*k*). But it does not appear that reversion duty was made a charge on the estate in reversion whereof the falling into possession gave rise to the claim for the duty (*l*).

Effect of grant of reversion.

Here the reader may be reminded that by a grant of the freehold reversion on a lease for years the rent reserved (which is incident to the reversion) passes to the grantee at common law, and, since statute 4 & 5 Anne, c. 3 (*m*), without the necessity of any attornment by the tenant; and the grantee may distrain or sue for the rent accordingly (*n*). By statute

between the lessor and the lessee, whether express or implied, not contained in the lease itself, unless the lease would, apart from that agreement, have determined within that period. (2) Where the land was at the time of the determination of the lease agricultural land. (3) Where the interest of the lessor expectant on the determination of the lease was a leasehold interest which did not exceed twenty-one years. (4) On the determination of a mining lease. (5) Where the lease was determined in pursuance of an agreement between the lessor and the lessee for the acquisition by the lessee of the lessor's interest and the lease had at the time of its determination at least fifty years to run, and the total value of the land did not exceed 500*l*. (6) On the determination before the expiration of the term granted of a lease of land held upon trust for any body of persons by the surrender thereof to the lessor upon the terms that he should grant to those persons severally leases of various plots of land representing in the aggregate the whole of the land comprised in the original lease, for a term in each case equal to the unexpired term of the original lease and at rents amounting in the aggregate to but not exceeding the rent reserved by the original lease. See stats. 10 Edw. VII. c. 8, ss. 14 (1, 2), 22 (1); 1 & 2 Geo. V. c. 2, s. 3 (3, 4).

(*k*) Stat. 10 Edw. VII. c. 8, ss. 13-15, 41, amended by 1 & 2 Geo. V. c. 2, s. 3; see Wms. Real Prop. 383, n. (*q*), 23rd ed.

(*l*) Where reversion duty became payable in consequence of the determination of the lease at the moment of actual completion on the proper date of the purchase of the reversion—as where the lessee was the purchaser and took at the proper date a conveyance of the reversion whereby the term was merged—the duty appears to have been payable by the vendor, as being the person in whom the lessor's interest was vested immediately before the transaction in consequence of which the lease had determined. It therefore became usual to stipulate, on sales of the reversion on a lease, where the lessee was or might be the purchaser or the person to whom the reversion might be directed to be conveyed on completion, that the conveyance should be taken in such form that the lease should not merge in the reversion.

(*m*) [C. 16 in Ruffhead] s. 9; see *Allcock* v. *Moorhouse,* 9 Q. B. D. 366; *Horn* v. *Beard,* 1912, 3 K. B. 181.

(*n*) Litt. ss. 58, 72, 213, 214, 228, 229, 572; *Reeves* v. *Pope,* 1914, 2 K. B. 284; Sug. V. & P. 583; Dart, V. & P. 812, 5th ed.; 914, 6th ed.; 822, 7th ed.; Wms. Real Prop. 369, 370, 23rd ed.

32 Hen. VIII. c. 34, the grantee of such a reversion is enabled to sue upon such of the lessee's covenants contained in the lease as "touch or concern" the land demised (*o*), and also to take advantage of any condition of re-entry contained in the lease for non-payment of rent or breach of covenant (*p*). This statute, however, does not enable the grantee of the reversion to sue upon any covenant by the lessee which is collateral, and does not touch or concern the land demised (*q*), or to sue *at law* upon any agreement to be performed by a lessee and contained in a lease not made by deed (*r*). But it appears that at common law an assignee of the reversion may sue the tenant upon agreements implied by law on his part; and this rule applies to tenancies created without any deed or writing (*s*). And in consequence of the doctrine introduced since the commencement of the Judicature Acts (*t*) that, where land is held under an agreement for a lease of which either landlord or tenant can enforce specific performance, the party so entitled is to be treated, in all Courts having jurisdiction to decree specific performance of the contract, as holding the land as landlord or tenant thereof *at law* upon the terms of the agreement (*u*), it has been decided that, where land is held for a term of years under a contract not made by deed but specifically enforceable by the landlord, and the landlord assigns the reversion with the benefit of the contract, the assignee is entitled to enforce all stipulations by the lessee contained in the contract and relating to the land demised as effectually as if such stipulations had been expressed in covenants contained in a lease by deed (*x*).

Grantee's right to enforce lessee's covenants and conditions.

(*o*) *Spencer's case*, 5 Rep. 16, 18; *Sunderland Orphan Asylum* v. *River Wear Commrs.*, 1912, 1 Ch. 191; Sug. V. & P. 582, 583; Dart, V. & P. 814, 5th ed.; 916, 6th ed.; 824, 7th ed.

(*p*) Co. Litt. 215; Wms. Real Prop. 368, 558, 559, 23rd ed.

(*q*) 5 Rep. 18; Sug. V. & P. 583; and see *Webb* v. *Russell*, 3 T. R. 393; *Dewar* v. *Goodman*, 1909, A. C. 72; *Ricketts* v. *Enfield Churchwardens*, 1909, 1 Ch. 544.

(*r*) *Standen* v. *Christmas*, 10 Q. B. 135; *Bickford* v. *Parson*, 5 C. B. 920; *Blane* v. *Francis*, 1917, 1 K. B. 252, 256; *Cole* v. *Kelly*, 1920, 2 K. B. 106, 120.

(*s*) *Wedd* v. *Porter*, 1916, 2 K. B. 91, 101.

(*t*) Stats. 36 & 37 Vict. c. 66; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77.

(*u*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Furness* v. *Bond*, 4 Times L. R. 457; *Lowther* v. *Heaver*, 41 Ch. D. 248, 264; *Crump* v. *Temple*, 7 Times L. R. 120; *Foster* v. *Reeves*, 1892, 2 Q. B. 255; *Goldstein* v. *Sanders*, 1915, 1 Ch. 549, 556; Wms. Real Prop. 547, 23rd ed.

(*x*) *Manchester Brewery Co.* v. *Coombs*, 1901, 2 Ch. 608; *Rickett* v. *Green*, 1910, 1 K. B. 253.

Rights given by the Conveyancing Act, 1881, to enforce lessees' covenants and conditions.

As regards leases made after the year 1881, the Conveyancing Act, 1881 (*y*), provides that the rent thereby reserved and the benefit of the lessees' covenants therein contained and having reference to the subject-matter thereof, and every condition of re-entry and other condition therein contained shall be annexed to the reversionary estate in the land, immediately expectant on the term thereby granted (notwithstanding severance of that reversionary estate), and shall be capable of being recovered and enforced by the person from time to time entitled, subject to the term, to the income of the whole or any part of the land leased. The chief effect of the first part of this enactment is to enable the person seised of the legal estate in reversion in land leased under some statutory power to sue upon the lessee's covenants or a condition of re-entry contained in the lease. Thus where land is leased by a mortgagor under the power of leasing given by the Conveyancing Act, 1881 (*z*), the mortgagee is enabled to sue on the lessee's covenants and conditions contained in the lease (*a*). So, where a lease is granted by a legal or an equitable tenant for life under the Settled Land Act, 1882 (*b*), the right to recover the rent and sue on the lessee's covenants and conditions is annexed to the legal estate in reversion on the term granted. And the enactment quoted applies equally to leases made in exercise of the right of alienation incident to the lessor's estate (*c*), and to those granted under express powers of leasing conferred by means of the Statute of Uses (*d*) or by will: though as to these it hardly seems to have extended the previous law (*e*). But the last part of this enactment invests the person for the time being entitled to the income of the land leased (in that capacity) with a new and independent remedy; and it has been held that it

In leases granted under statutory powers.

In other leases.

Remedy given to the person entitled to the income of the land leased.

(*y*) Stat. 44 & 45 Vict. c. 41, s. 10.

(*z*) Stat. 44 & 45 Vict. c. 41, s. 18.

(*a*) *Municipal, &c. Building Society* v. *Smith,* 22 Q. B. D. 70. But probably only after giving notice to the tenant to pay rent to him (the mortgagee): see *S. C.*, per Lopes, L. J., p. 74.

(*b*) Stat. 45 & 46 Vict. c. 38, ss. 6-12, 20; see Wms. Real Prop. 125-128, 131, 199, 437, 438, 23rd ed.

(*c*) *Rickett* v. *Green,* 1910, 1 K. B. 253; see Wms. Real Prop. 75, 113, 123, 229, 553, 23rd ed.

(*d*) Stat. 27 Hen. VIII. c. 10; see Wms. Real Prop. 426, 607, 608, 23rd ed.

(*e*) See *Whitlock's case,* 8 Rep. 69b, 71a; *Isherwood* v. *Oldknow,* 3 M. & S. 382; *Greenaway* v. *Hart,* 14 C. B. 340; *Yellowly* v. *Gower,* 11 Ex. 274; Davidson, Prec. Conv. vol. iii. pp. 484 and n. (*x*), 491-500, 3rd ed.; vol. ii. pt. ii. p. 336, n., 4th ed.; Sug. Pow. 722, 813-815, 8th ed.; Williams on Settlements, 36-39, 311-313.

enables a mortgagor in possession (who has received no notice from the mortgagee of intention to enter into receipt of the rents) to sue upon the lessee's covenants contained in a lease made by him before the mortgage (*f*). The above enactment of the Conveyancing Act, 1881 (*g*), applies to leases made by writing without deed, and in the case of the breach of some agreement which is either expressed or to be implied in such a lease (*h*): but it does not apply to leases made by word of mouth, or to the tenancy constituted by the acceptance of rent from a tenant holding over (*i*). The same construction has been placed on this enactment with respect to agreements for leases (*k*) as has been applied to the statute of Henry VIII. (*l*).

Rights of assignee of reversion as to rent due or breach of covenant committed before his time.

The assignee of the reversion on a lease cannot sue the lessee for any rent due (*m*) or for any breach of covenant committed previously to the assignment (*n*); unless the right to sue for such rent or breach of covenant should have been expressly assigned to him (*o*). And formerly he was not entitled to exercise any right of re-entry given by the lease in respect of any breach of covenant committed previously to the assignment (*p*); nor could the right to re-enter for any such past breach of covenant be effectually assigned to him, as a right of entry for

(*f*) *Turner* v. *Walsh*, 1909, 2 K. B. 484.
(*g*) Above, p. 386, n. (*y*).
(*h*) *Cole* v. *Kelly*, 1920, 2 K. B. 106.
(*i*) *Blane* v. *Francis*, 1917, 1 K. B. 252; see also *Wedd* v. *Porter*, 1916, 2 K. B. 91, 100.
(*k*) *Rickett* v. *Green*, 1910, 1 K. B. 253.
(*l*) Above, p. 385, notes (*u*), (*x*).
(*m*) *Flight* v. *Bentley*, 7 Sim. 149, 151.
(*n*) *Johnson* v. *St. Peter's Churchwardens*, 4 A. & E. 520; *Martyn* v. *Williams*, 1 H. & N. 817; cf. *Mascal's case*, 1 Leon. 62; *Brown* v. *Trumper*, 26 Beav. 11, 16; *Wedd* v. *Porter*, 1916, 2 K. B. 91, 102; *Cole* v. *Kelly*, 1920, 2 K. B. 106, 128, 131, 132, 134. The statement to the contrary made in Sug. V. & P. 181 and adopted in 2 Dart, V. & P. 814, 5th ed. (916, 6th ed.; 824, 7th ed.) seems to be incorrect.
(*o*) An agreement made on a sale of land to assign such rights to the purchaser is valid and does not offend against the law of maintenance or champerty; and such rights might well be assigned at common law by power of attorney; *Williams* v. *Protheroe*, 5 Bing. 309, 3 Y. & J. 129; *Johnson* v. *St. Peter's Churchwardens*, 4 A. & E. 520, 527. And since the Judicature Acts such rights may well be assigned directly to the purchaser; *Defries* v. *Milne*, 1913, 1 Ch. 98, 102, 108, 109; *Ellis* v. *Torrington*, 1920, 1 K. B. 399; and see *Cole* v. *Kelly*, 1920, 2 K. B. 106, 128, 131, 132, 134.
(*p*) *Fenn* v. *Smart*, 12 East, 444; *Hunt* v. *Bishop*, 8 Ex. 675, 680; *Hunt* v. *Remnant*, 9 Ex. 635, 640; *Crane* v. *Batten*, 2 Com. Law Rep. 1696; 23 L. T. (O. S.) 220; Williams on Seisin, 125; *Cohen* v. *Tannar*, 1900, 2 Q. B. 609; cf. *Bennett* v. *Herring*, 3 C. B. N. S. 370.

condition broken is not assignable at common law or under the Real Property Act, 1845 (*q*). It does not appear that the law was altered in any of these respects by the provisions of the Conveyancing Act, 1881, quoted in the preceding paragraph (*r*). But by the Conveyancing Act, 1911, sect. 10 of the Act of 1881 (*s*) shall apply to the benefit of every condition of re-entry or forfeiture for a breach of any covenant or condition contained in a lease, so as to enable the same to be enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased, although that person became, by conveyance or otherwise, so entitled after the condition of re-entry had become enforceable, provided that he became so entitled as aforesaid after the commencement of the Act of 1911 (*t*). This enactment is not to render enforceable any condition of re-entry or other condition waived or released before that person became entitled as aforesaid (*u*). This enactment, being an extension of sect. 10 of the Act of 1881, appears to apply only to leases made after that year (*x*). It seems to enable the assignee, under an assignment made after the year 1911, of the reversion on such a lease to take advantage of a condition of re-entry for a breach of covenant committed and not waived or released before the assignment, but it does not appear to enable the assignee to sue for damages for such a breach of covenant, or for any rent due before the assignment (*y*). And if the assignee himself waive the breach of covenant, he cannot enforce the right of re-entry therefor (*z*).

Rights of assignee of part of the reversion on a lease.

The assignee of a part of the reversion in the whole of the lands demised by a lease (as an assignee for life or for some term of years exceeding that granted by the lease) is entitled,

(*q*) Stat. 8 & 9 Vict. c. 106, s. 6; see cases cited in previous note; *Jenkins* v. *Jones*, 9 Q. B. D. 128, 131; below, Chap. XV.

(*r*) See *Cohen* v. *Tannar*, 1900, 2 Q. B. 609; *Morris* v. *Kennedy*, 1896, 2 Ir. R. 247.

(*s*) Above, p. 386.

(*t*) Stat. 1 & 2 Geo. V. c. 37, s. 2 (1). This Act came into operation on the 1st Jan. 1912; sect. 16 (2).

(*u*) Sect. 2 (2).

(*x*) See above, p. 386.

(*y*) See above, p. 387.

(*z*) *Davenport* v. *Smith*, 1921, 2 Ch. 270, deciding that, if the assignee clearly recognise the subsistence of the lease in the deed of conveyance to himself, he thereby waives the breach: but see a criticism of this decision in 66 Sol. J. 263.

as well as the assignee of the entire reversion, to sue, during the continuance of his interest, for the rent reserved by the lease, and under the above statute of Henry VIII. and the Conveyancing Act, 1881 (*a*), to sue upon the covenants and take advantage of any condition of re-entry contained in the lease (*b*). And such an assignee appears to be entitled to exercise the rights given by sect. 2 of the Conveyancing Act, 1911 (*c*).

Severance of reversion on a lease for years.

Where land has been let for a term of years and the reversion of part only of the land is assigned over, the rent is apportionable at common law (*d*), and the assignee can sue on the lessee's covenants under the statute 32 Hen. VIII. c. 34, with respect to that part of the land of which the reversion has been assigned to him (*e*). But the assignee of the reversion of part of lands demised could not, under the statute of Henry VIII., take advantage of any condition of re-entry contained in the lease; for the condition was destroyed by the severance of the reversion and was no longer enforceable even by the original landlord as to that part of the reversion which he retained (*f*). By Lord St. Leonards' Act (*g*), where the reversion upon a lease is severed and the rent is legally apportioned (*h*), the assignee of each part of the reversion is allowed to take the benefit of a condition of re-entry for non-payment of rent in respect of the apportioned rent so belonging to him. And under the Conveyancing Act, 1881 (*i*), on severance of the reversion on a lease made after that year every condition of re-entry or other condition therein contained (including, of course, any condition of re-entry for breach of covenant) is apportionable, and may be enforced by the assignee or other person entitled to each

Its effect on conditions of re-entry.

(*a*) Above, pp. 385-387.

(*b*) Co. Litt. 215a; *Wright* v. *Burroughes*, 3 C. B. 685; *Horn* v. *Beard*, 1912, 3 K. B. 181; *Cole* v. *Kelly*, 1920, 2 K. B. 106, 120, 124.

(*c*) Stat. 1 & 2 Geo. V. c. 37; above, p. 388, and n. (*t*).

(*d*) 2 Inst. 504; *Mitchell* v. *Mosley*, 1914, 1 Ch. 438. Rent can only be legally apportioned with the consent of the tenant to the apportionment, or by the verdict of a jury: *Bliss* v. *Collins*, 5 B. & A. 876; *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48; 1 Davidson, Prec. Conv. 546, 4th ed.; 452, 5th ed.

(*e*) *Twynam* v. *Pickard*, 2 B. & A. 105; *Badeley* v. *Vigurs*, 4 E. & B. 71; *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48.

(*f*) *Winter's case*, Dyer, 308; Co. Litt. 215a.

(*g*) Stat. 22 & 23 Vict. c. 35, s. 3.

(*h*) See above, n. (*d*).

(*i*) Stat. 44 & 45 Vict. c. 41, s. 12; see also s. 10, above, p. 386, and its extension by the Act of 1911, above, p. 388.

part of the reversionary estate. But the assignee of the reversion of part of the land demised by a lease made before the year 1882 cannot take advantage of a proviso for re-entry on breach of covenant: though the condition is apportionable if the reversion were severed by act in the law, or by the involuntary act of the reversioner, as where part of the land leased has been taken compulsorily under the Lands Clauses Act, 1845 (*k*).

Notice to quit where the reversion has been severed.

Where lands have been let to a tenant from year to year, and the reversion of part of the lands is assigned, a valid notice to quit can only be given by the persons for the time being entitled to the reversion of the whole of the demised premises, and the assignee of the reversion of part cannot give notice to determine the tenancy as to his part (*l*). It does not appear that in this respect the law has been altered by the Conveyancing Act, 1881 (*m*). As already mentioned (*n*), when the reversion of part of lands leased for years is sold by auction, it is usual to stipulate that the purchaser shall be entitled to some specific portion of the rent, and shall not require the rent to be legally apportioned.

Stipulation precluding legal apportionment of rent.

Notices to quit with a view to sale.

By the Agricultural Holdings Act, 1914 (*o*), provision was made for compensation to a tenant where the tenancy was terminated by notice to quit given in view of the sale of the holding. By the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919 (*p*), it was provided that on the making of any contract for sale of an agricultural holding or any part of a holding held by a tenant from year to year, any then current and unexpired notice to determine the tenancy should be null and void. It thus became impracticable to give a notice to quit for the purpose of selling with vacant possession unless the notice was allowed to run out before any contract

(*k*) Stat. 8 & 9 Vict. c. 18; *Pigott* v. *Middlesex County Council*, 1909, 1 Ch. 134, 142, 143. The common law rule (above, p. 389 and n. (*f*)) is also subject to an exception in favour of the Crown; *Knight's case*, 5 Rep. 54; Co. Litt. 215a.

(*l*) *Prince* v. *Evans*, 29 L. T. N. S. 835; *Re Bebington's Tenancy*, 1921, 1 Ch. 559; see also *Doe* d. *Prichitt* v. *Mitchell*, 1 Brod. & Bing. 11; *Right* d. *Fisher* v. *Cuthell*, 5 East, 491, 498, per Grose, J.; *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135, 141.

(*m*) Stat. 44 & 45 Vict. c. 41, see ss. 10, 12.

(*n*) Above, p. 77.

(*o*) Stat. 3 & 4 Geo. V. c. 7. If at the determination of the tenancy the purchaser was entitled to the rent and profits, he was the person liable to pay compensation; *Bradshaw* v. *Bird*, 1920, 3 K. B. 147.

(*p*) Stat. 9 & 10 Geo. V. c. 63; Wms. Real Prop. 579, 580, 23rd ed.

for sale was made. This answered the chief purpose of the Act of 1914, and that Act has been repealed (*q*). The notice to quit is void even though the tenant himself becomes during its currency the purchaser of part of the holding (*r*). But in order that the notice shall be void the contract must be made by the person by whom it was given (*s*). Where a notice to quit expires before a contract for sale, the general provisions as to compensation for disturbance contained in Part II. of the Agriculture Act, 1920, apply (*t*).

Reversions or remainders on an estate of freehold—

We have seen (*u*) that on the purchase under an open contract of a reversion or remainder expectant on an estate of freehold, the title must be carried back to the instrument creating the same, whatever be its date; and proof must be given that the possession of the land has been in accordance with that instrument. The main difficulty in establishing the title to such interests arises from the fact that, as the tenant of the particular estate is entitled to the custody of the title deeds, no proof can be given, beyond the vendor's affirmation, that the reversion or remainder sold has not been previously disposed of by way of sale or mortgage (*x*). Purchasers and mortgagees of reversions or remainders expectant on estates for life or other interests conferring the power of sale and other powers given by the Settled Land Acts, 1882 to 1890 (*y*), take subject to the subsequent exercise of such powers by the particular tenant, and their estates are liable to be divested accordingly, and in the case of sale to be transferred to the purchase money (*z*). Purchasers

are subject to exercise of powers given by Settled Land Acts—

(*q*) By stat. 10 & 11 Geo. V. c. 76, s. 36, and Second Schedule.

(*r*) *Blay* v. *Dadswell*, 1922, 1 K. B. 632.

(*s*) Stat. 9 & 10 Geo. V. c. 63, s. 1, as amended by stat. 10 & 11 Geo. V. c. 76, s. 29, and First Schedule, overriding *Robinson* v. *Nesbitt*, 64 Sol. J. 291.

(*t*) Stat. 10 & 11 Geo. V. c. 76, s. 10.

(*u*) Above, pp. 91, 94, 95.

(*x*) Wms. Real Prop. 463, 13th ed.; 658, 23rd ed. The purchaser can of course inquire of the person entitled to the custody of the title deeds whether he is aware of any sale of the reversion, and whether the deeds have been produced at the request of the reversioner with a view to any sale or mortgage by him; but the person interrogated is not bound to answer, and an answer in the negative is no certain protection, as the reversion may have been disposed of by way of sale or mortgage without the knowledge of the particular tenant, and without production of the title deeds.

(*y*) Stats. 45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69.

(*z*) *Wheelwright* v. *Walker*, 23 Ch. D. 752; *Re Dickin and Kelsall's Contract*, 1908, 1 Ch. 213; *Re Davies and Kent's Contract*, 1910, 2 Ch. 35; see above, pp. 298-302.

and to succession and estate duty.

and mortgagees of such estates also take subject to the liability to pay any succession or estate duty which shall be charged thereon when the same shall fall into possession (*a*); and in the case of a sale the purchaser cannot (unless he specially stipulate therefor) require the vendor to procure such duty to be commuted or to discharge it when it falls due; for the tax is regarded as an incident of the estate and not as an incumbrance (*b*). But where such estates have been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, before the 2nd of August, 1894 (the date of the commencement of the Finance Act, 1894), no other duty will be payable by the purchaser or mortgagee, when the estates fall into possession, than would have been payable if that Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee (*c*).

Sales of reversionary interests at an undervalue.

Sales of reversionary interests were formerly liable to be set aside in equity on the ground of mere inadequacy of consideration (*d*). But this rule was abolished by statute as from the 1st of January, 1868, since when no purchase made *bonâ fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate is to be opened or set aside merely on the ground of undervalue (*e*).

Time of essence of contract on sale of reversionary property.

On the purchase of reversionary property, time is of the essence of the contract (*f*), and as the wearing out of the interest of the particular

(*a*) Stats. 16 & 17 Vict. c. 51, ss. 2, 20, 42; 57 & 58 Vict. c. 30, ss. 1, 2, 9; see below, Chap. XXI. §§ 2, 3.

(*b*) *Cooper* v. *Trewby*, 28 Beav. 194; *Re Kidd and Gibbon's Contract*, 1893, 1 Ch. 695, 698; *Re Repington*, 1904, 1 Ch. 811, 814; see also *Re Langham*, 1890, W. N. 213; 60 L. J. Ch. 110.

(*c*) Stat. 57 & 58 Vict. c. 30, s. 21 (3). By stat. 7 Edw. VII. c. 13, s. 12 (which increased the scale of rates of estate duty), where such estates have been sold or mortgaged as above mentioned before the 19th April, 1907, no other duty will be payable by the purchaser or mortgagee, when the estates fall into possession, than would have been payable if that section had not passed; and in the case of a mortgage any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee. Stat. 10 Edw. VII. c. 8 (which further increased the scale of rates of estate duty), contains a similar provision (sect. 64) as to sales and mortgages made as above mentioned of such estates before the 30th April, 1909; and stat. 4 & 5 Geo. V. c. 10 (which again increased the scale of rates), contains a similar provision (sect. 161) as to like sales and mortgages before the 11th May, 1914.

(*d*) See 2 Dart, V. & P. 750 *sq.*, 5th ed.; 844 *sq.*, 6th ed.; 749 *sq.*, 7th ed.

(*e*) Stat. 31 & 32 Vict. c. 4; see below, Chap. XIV. § 2, as to the construction of this Act.

(*f*) Above, p. 54; *Newman* v. *Rogers*, 4 Bro. C. C. 391; Sug. V. & P. 262; 1 Dart, V. & P. 419, 5th ed.; 484, 6th ed.; 497, 7th ed.; below, Chap. XII. § 1.

tenant is considered equivalent to perception of the profits, interest is payable on the purchase money from the date of the contract, if no time be specified for completion (*g*); or if a time be fixed for completion, then from that time (*h*).

Allotments under an Inclosure Act.

Where land sold consists of an allotment acquired under an Inclosure Act (*i*), the title material to be investigated, prior to the award made pursuant to the Act, is that under which all the lands, in respect of which the allotment was awarded, were held (*k*). It is also material to ascertain that the powers given by the Act were not exceeded in making the award, for no title is conferred by the award of any allotment made *ultra vires* (*l*).

Exchange effected by mutual conveyances.

Where the title to land sold is made under an exchange effected in the manner which has now long been usual,—namely, by deeds of mutual conveyance containing vendor's covenants for title, but no provision for mutual re-entry in case of evic-

(*g*) *Ex parte Manning*, 2 P. W. 410; *Child* v. *Abingdon*, 1 Ves. jun. 94; *Champernowne* v. *Brooke*, 3 Cl. & Fin. 4, 23; *Brooke* v. *Champernowne*, 4 Cl. & Fin. 589; *Enraght* v. *Fitzgerald*, 2 Dr. & War. 43, 47; *Vesey* v. *Elwood*, 3 Dr. & War. 74, 82; *Wallis* v. *Sarel*, 5 De G. & S. 429.

(*h*) *Bailey* v. *Collett*, 18 Beav. 179; Sug. V. & P. 628; 1 Dart, V. & P. 630, 631, 5th ed.; 712, 6th ed.; 654, 7th ed.

(*i*) As to the inclosure of common fields and commons, see Wms. Real Prop. 63, 462, 23rd ed.; Williams on Commons, 77-79, 246 *sq.*

(*k*) *Major* v. *Ward*, 5 Hare, 598, 604; Sug. V. & P. 372, 373; 1 Dart, V. & P. 164, 286, 5th ed.; 186, 326, 6th ed.; 181, 322, 7th ed.; 1 Davidson, Prec. Conv. 527, 4th ed. Inclosure Acts usually provided that the tenure of the lands allotted should be the same as that of the lands in respect of which the allotment was made, and reserved the minerals under the lands allotted to the persons previously entitled to them: but where no such provisions were made, the tenure of the allotments was freehold and the mines under them passed with the soil to the allottees; see Davidson, Prec. Conv. vol. ii. part i. p. 491, n., 4th ed.; *Townley* v. *Gibson*, 2 T. R. 701; *Doe* d. *Lowes* v. *Davidson*, 2 M. & S. 175; *Doe* v. *Hellard*, 9 B. & C. 789; *Wakefield* v. *Buccleugh*, L. R. 4 Eq. 613, 627; 4 H. L. 377; *Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland, &c. Co., Ltd.*, 1906, A. C. 305; Williams on Commons, 223, 224, 250, 251; Inclosure Act, 1845 (stat. 8 & 9 Vict. c. 118), ss. 94, 98. As to the question whether the right of sporting over allotments of waste land has been reserved by an Inclosure Act to the lord of the manor, see Williams on Commons, 240-243; *Devonshire* v. *O'Connor*, 24 Q. B. D. 468; *Ecroyd* v. *Coulthard*, 1898, 2 Ch. 358; and as to mines, cf. *Thomson* v. *St. Catherine's College, Cambridge*, 1919, A. C. 469, overruling *St. Catherine's College, Cambridge* v. *Greensmith*, 1912, 2 Ch. 280, and *St. Catherine's College, Cambridge* v. *Rowe*, 1916, 1 Ch. 73.

(*l*) *Wingfield* v. *Tharp*, 10 B. & C. 785; *Casamajor* v. *Strode*, 2 My. & K. 706, 718-722; Sug. V. & P. 375.

tion (*m*),—the title to be investigated prior to the exchange (*n*) is the previous title to the land *taken* in exchange alone, and the title to the land *given* in exchange is immaterial (*o*). But where land sold has been acquired through an exchange effected by an order of exchange made under the Inclosure Act, 1845, and the Acts amending it (*p*), it is unnecessary for the purchaser to investigate the title to the land so acquired prior to the order of exchange (*q*); for unless the order were made without jurisdiction, that land thenceforward became irrevocably subject to the title, under which the land given in exchange was held (*r*). The prior title to the land *given* in exchange is, therefore, the only title which it is material to investigate (*s*); but as it appears that the order of exchange would be invalid if made without jurisdiction, and such jurisdiction arises on the application of the persons interested in the land proposed to be exchanged (*t*), it seems that the purchaser would be entitled to require proof that the person who applied for the order in respect of the land taken in exchange was in fact interested therein within the meaning of the Acts (*u*).

Exchange by order under the Inclosure Act, 1845.

(*m*) See Davidson, Prec. Conv. vol. v. pt. ii. pp. 77-81, 3rd ed.; 1 Key & Elph. Prec. Conv. 700-713, 4th ed.; 806-821, 10th ed.

(*n*) If the exchange were made at least forty years before the sale, it would of course be a good root of title; see above, pp. 93, 98.

(*o*) The acquisition of land in this way is exactly similar to its acquisition on sale, and if the title to the land given in exchange were bad, the party who took it in exchange would, in the absence of fraudulent misrepresentation, have no right to recover possession of the land which he exchanged for it, but could only pursue his remedy in damages under the covenants for title; *Bartram* v. *Whichcote*, 6 Sim. 86, 92; see below, Chap. XII. § 3; Chap. XIV. § 1; Chap. XIX. § 5. But where an exchange of lands was effected *at common law* before the year 1845, a mutual right of re-entry on eviction was implied, and so the title both to the land given and to the land taken in exchange was material; see *Bustard's case*, 4 Rep. 121 a; Sug. V. & P. 372; 1 Davidson, Prec. Conv. 528, 4th ed.; Wms. Real Prop. 168, and n. (*f*), 228, 669, 23rd ed.; stats. 7 & 8 Vict. c. 76, s. 6; 8 & 9 Vict. c. 106, s. 4.

(*p*) See above, pp. 134 and n. (*b*), 139 and n. (*c*); Wms. Real Prop. 150, 228, 23rd ed.

(*q*) 1 Davidson, Prec. Conv. 529, 4th ed.; 1 Dart, V. & P. 287, 5th ed.; 328, 6th ed.; 324, 7th ed.

(*r*) Stat. 8 & 9 Vict. c. 118, s. 147; *Minet* v. *Leman*, 20 Beav. 269, 279, 7 De G., M. & G. 340 (deciding that gavelkind land may well be so exchanged for land held in free and common socage); Collins, J., *Jacomb* v. *Turner*, 1892, 1 Q. B. 47, 51, 52; Davidson, Prec. Conv. vol. ii. pt. i. pp. 94, 95, n., 100, n., 4th ed.

(*s*) Such an order of exchange is not in itself a good root of title, as it affords no evidence of the validity of the title to the land given in exchange; see previous note; above, p. 98.

(*t*) *Jacomb* v. *Turner*, 1892, 1 Q. B. 47, 52.

(*u*) See stat. 8 & 9 Vict. c. 118, ss. 16 *sq.*, 147; above, note (*m*); Davidson, Prec. Conv. vol. ii. pt. i. pp. 95, n., 100, n., 4th ed.

Mines and minerals.

Royal mines.

A sale as well as a conveyance of land includes the right to all mines and minerals in and under the land (*x*); except only gold and silver mines, which belong to the Crown (*y*). If, therefore, the vendor desire to reserve any minerals or have no title to the mines, he must be careful to provide by express stipulation that the minerals he desires to retain shall be excepted from the sale and sufficient working powers reserved to him, or that he is selling the surface only (*x*). Whenever mines and minerals are excepted from a conveyance of land by the agreement of the parties thereto, it appears that the word *minerals*, unless limited by the context, will include every substance embedded in or forming part of the land and having a value of its own apart from its worth as a portion of the soil (*z*).

What is included in the term *minerals*.

So also after exchanges made under most local Inclosure Acts, upon inclosure under the Inclosure Act, 1845 (see *Jacomb* v. *Turner*, 1892, 1 Q. B. 47, 50), of lands lying in common fields, under stat. 4 & 5 Will. IV. c. 30, or under the Acts authorising the exchange of ecclesiastical property (stats. 55 Geo. III. c. 147; 56 Geo. III. c. 52; 1 Geo. IV. c. 6; 6 Geo. IV. c. 8), the title, prior to the exchange, of the land taken in exchange is not material, and it is only necessary to ascertain that the jurisdiction or right to make the exchange duly arose; see Sug. V. & P. 373; 1 Dart, V. & P. 287, 5th ed.; 327, 6th ed.; 323, 7th ed.; 1 Davidson, Prec. Conv. 529, 4th ed. Where land was taken in exchange from a charity under stat. 1 & 2 Geo. IV. c. 92, repealed by 36 & 37 Vict. c. 91, the title to the land given and to that taken in exchange was material; 1 Dart, V. & P. 288, 5th ed.; 328, 6th ed.; 325, 7th ed.; 1 Davidson, Prec. Conv. 530, 4th ed. But where an exchange of charity land has been effected under the Charitable Trusts Act, 1853 (stat. 16 & 17 Vict. c. 137), ss. 24, 26, the transaction stands on the same footing as an exchange by deed of mutual conveyance; see above, p. 394; below, § 7 of this chapter; 1 Dart, V. & P. 329, 6th ed.; 325, 7th ed.

(*x*) See *Bellamy* v. *Debenham*, 1891, 1 Ch. 412; *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412; *M'Grory* v. *Alderdale Estate Coy., Ltd.*, 1918, 503, 507, 510, 512; above, p. 153.

(*y*) *The case of Mines*, Plowd. 310, 336, 337; 1 Black. Com. 295; *A.-G.* v. *Morgan*, 1891, 1 Ch. 432.

(*z*) Romilly, M. R., *Midland Ry. Co.* v. *Checkley*, L. R. 4 Eq. 19, 25; *Hext* v. *Gill*, L. R. 7 Ch. 699, 712, 719; Kay, J., *Midland Ry. Co.* v. *Haunchwood, &c. Co.*, 20 Ch. D. 552, 555; *Jersey* v. *Neath Poor Law Union*, 22 Q. B. D. 555, 559, 561, 563; *Johnstone* v. *Crompton*, 1899, 2 Ch. 190; *Great Western Rail. Co.* v. *Blades*, 1901, 2 Ch. 624, 631, 636, 638; *Re Todd, Birleston & Co. and North Eastern Ry.*, 1903, 1 K. B. 603, 606, 607; *Great Western Ry.* v. *Carpalla, &c. Co., Ltd.*, 1909, 1 Ch. 218, 226, 229, 231, 237; affirmed, 1910, A. C. 83. The meaning of "minerals" is a question of fact to be determined, in the absence of special circumstances, in accordance with the vernacular of the mining world and commercial world and landowners at the date of the instrument; *Hext* v. *Gill*, supra, 719, per James, L. J.; *Lord Provost, &c. of Glasgow* v. *Farie*, 13 App. Cas. 657, 669, per Lord Halsbury, C.; see *Todd, Birleston & Co. and North Eastern Ry. Co.*, 1903, 1 K. B. 603, 606, 607, per Lord Halsbury, C.; *North British Ry.* v. *Budhill Coal and Sandstone Co.*, 1910, A. C. 116, 127,

Thus the term minerals, when used in such a conveyance (*a*), has been held to include china clay (*b*), coprolites (*c*), and brick earth and clay (*d*), and would certainly comprise slate, freestone and limestone (*e*), and every other kind of stone (*f*), besides

134; *Caledonian Ry.* v. *Glenboig Union Fireclay Co.*, 1911, A. C. 290, 299. The test suggested by Mellish, L. J., in *Hext* v. *Gill*, supra, at p. 712, that to be a mineral the substance must be got for the purpose of profit cannot be relied on, unless, as explained in *Jersey* v. *Guardians of Neath Poor Law Union*, 22 Q. B. D. 555, 562, Bowen, L. J., 564, Fry, L. J., it simply means that the substance has independent use and value apart from the rest of the soil; see MacSwinney on Mines, 11 *sq.*, 5th ed. "Mines" and "minerals" are not definite terms: they are susceptible of limitation or expansion, according to the intention with which they are used; *Lord Provost, &c. of Glasgow* v. *Farie*, supra, p. 675, Lord Watson; *North British Ry.* v. *Budhill Coal and Sandstone Co.*, supra, 130; *Barnard-Argue-Roth-Stearn's Oil and Gas Co.* v. *Farquharson*, 1912, A. C. 864, 869. See the last case as to natural gas, and as to oil, *Linlithgow* v. *North British Ry.*, 1912, S. C. 1327 (on appeal, 1914, A. C. 820, the point was not decided). For the purpose of mineral rights duty under stat. 10 Edw. VII. c. 8, s. 20, brine is a mineral; *A.-G.* v. *Salt Union, Ltd.*, 1917, 2 K. B. 488.

(*a*) As to the meaning of the term *minerals* in the Railways Clauses Act, 1845 (stat. 8 & 9 Vict. c. 20), s. 77, (for Scotland, stat. 8 & 9 Vict. c. 33, s. 70), and the Waterworks Clauses Act, 1847 (stat. 10 & 11 Vict. c. 17), s. 18, which except from conveyances of any land acquired subject to the provisions of those Acts "all mines of coal, ironstone, slate, or other minerals" under such land, unless expressly named and conveyed; see *Lord Provost, &c. of Glasgow* v. *Farie*, 13 App. Cas. 657; *Midland Ry. Co.* v. *Robinson*, 15 App. Cas. 19; *Great Western Ry.* v. *Blades*, 1901, 2 Ch. 624; *Re Todd, Birleston & Co. and North Eastern Ry.*, 1903, 1 K. B. 603; *Great Western Ry.* v. *Carpalla, &c. Co., Ltd.*, 1909, 1 Ch. 218; 1910, A. C. 83, 85; *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.*, 1910, A. C. 116; *Caledonian Ry. Co.* v. *Glenboig Union Fireclay Co.*, 1911, A. C. 290; *Symington* v. *Caledonian Ry. Co.*, 1912, A. C. 87; from which it appears that in such cases the actual surface or subsoil of the lands conveyed is not excepted, though it may have a value independently of its worth as mere soil.

(*b*) *Hext* v. *Gill; Great Western Ry.* v. *Carpalla, &c. Co., Ltd.*, ubi sup.

(*c*) *A.-G.* v. *Tomline*, 5 Ch. D. 750, 762.

(*d*) *Jersey* v. *Neath Poor Law Union*, ubi sup. But clay under the statutory reservation in the Railways Clauses Act, 1845, may not be a mineral; see *Lord Provost, &c. of Glasgow* v. *Farie*, supra; *Great Western Ry.* v. *Blades*, 1901, 2 Ch. 624; *Re Todd, Birleston & Co. and North Eastern Ry. Co.*, 1903, 1 K. B. 603.

(*e*) *Bell* v. *Wilson*, L. R. 1 Ch. 303; Watson, L. A., *Lord Provost, &c. of Glasgow* v. *Farie*, 13 App. Cas. 657, 679. But see *Caledonian Railway* v. *Symington*, 1913, S. L. T. 294 (under the Railways Clauses Act), where, upon the evidence, the freestone there in question was held not to be a mineral.

(*f*) *Midland Ry. Co.* v. *Checkley*, L. R. 4 Eq. 19, 25. But see *North British Ry.* v. *Budhill Coal and Sandstone Co.*, 1910, A. C. 116, 125, where it was said that no decision had gone so far as that last cited, and it was held (under the Railways Clauses Act) that sandstone was not a mineral.

coal and ironstone (*g*). It appears that the term *minerals* would have the same meaning in a contract of sale as in a conveyance of land (*h*). A landowner who has sold and conveyed away the surface excepting the mines and minerals, but without reserving any express power to enter and get them, retains by implication of law all necessary powers for working the same: but the powers so reserved to him are only such as are strictly necessary for the purpose (*i*); and it is usual on such sales for the vendor to stipulate expressly for the reservation of larger powers, including the liberty of using the surface for works connected with the mines, such as the deposit of rubbish, the erection of engines and other works, or of cottages for work-people, and the making of tramways, railways, &c. (*k*). If a contract of sale of land should provide for the mines and minerals being excepted, but not for the reservation of any express powers of working them, the vendor would not be entitled to require the reservation to him, in the conveyance to the purchaser, of any larger powers than he would retain by implication of law; and if the contract should expressly provide for certain powers of working, the vendor could not require any larger powers to be reserved to him by the conveyance (*l*). In the absence of express or implied stipulation to that effect, a vendor retaining the mines and minerals will have no right to

Working powers implied on an exception of mines and minerals.

No larger powers can be reserved than were stipulated for in the contract.

Surface cannot be let down or destroyed without special power to do so.

(*g*) Moulton, L. J., *Great Western Ry.* v. *Carpalla, &c. Co., Ltd.*, 1909, 1 Ch. 218, 231; and see *Midland Ry. Co.* v. *Robinson*, 15 App. Cas. 19, 26, 33.

(*h*) See cases cited, above, p. 395, n. (*z*); *Newton, Chambers & Co., Ltd.* v. *Hall*, 1907, 2 K. B. 446, 452.

(*i*) *Cardigan* v. *Armitage*, 2 B. & C. 197, 207, 208, 211; affirmed in D. P., Sugd. Law of Property, 88-91.

(*k*) Williams on Commons, 221; see Davidson, Prec. Conv. vol. ii. pt. i. 484 *sq.* and note; 1 Key & Elph. Prec. Conv. 310, 311, 4th ed.; 369, 370, 10th ed.

(*l*) The rule is that the rights to be defined in the conveyance are those conferred by the contract; see *Re Peck and London School Board*, 1893, 2 Ch. 315; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595; *Re Walmsley and Shaw's Contract*, 1917, 1 Ch. 93; below, Chap. XII. § 3. *Semble*, if the contract gave the right to let down the surface without making compensation, the purchaser would have no right to insist that in the conveyance such right should be reserved on the condition of making compensation. It has been held that, where there is an exception of mines, reserving power to work so as to let down the surface on condition of making compensation, the stipulation as to compensation is a condition of exercising the liberty and as such enforceable against the assign of the owner of the excepted mines: *Aspden* v. *Seddon*, 1 Ex. D. 496; see *Westhoughton U. D. C.* v. *Wigan Coal and Iron Co.*, 1919, 1 Ch. 159.

let down the surface by his workings (*m*), or, where the excepted minerals can only be gotten by surface workings, to work them in such a way as will utterly destroy the surface soil of the land (*n*). So long as the ownership of any mines or minerals is enjoyed as an incident of the ownership of the surface, they pass, as a rule, without express mention (unless specially excepted) upon any conveyance or disposition of the surface (*o*);

Mines and minerals go along with the surface until severed.

(*m*) *Humphries* v. *Brogden*, 12 Q. B. 739; *Rowbotham* v. *Wilson*, 8 H. L. C. 348, 360; *Davis* v. *Treharne*, 6 App. Cas. 460; *Dixon* v. *White*, 8 App. Cas. 833, 842, 843; *Love* v. *Bell*, 9 App. Cas. 286; *Greenwell* v. *Low Beechburn Coal Co.*, 1897, 2 Q. B. 165; *New Sharlston Collieries Co., Ltd.* v. *Westmorland*, 1904, 2 Ch. 443, n.; *Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland, &c. Co., Ltd.*, 1906, A. C. 305; *Markham* v. *Paget*, 1908, 1 Ch. 697, 710; *Manley* v. *Burn*, 1916, 2 K. B. 121; *Westhoughton U. D. C.* v. *Wigan Coal and Iron Co.*, 1919, 1 Ch. 159; *Thomson* v. *St. Catherine's College, Cambridge*, 1919, A. C. 468. Whenever there is a severance in title between the surface and lower strata, the surface owner is entitled of common right to support for his property, unless interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication; *Butterknowle Colliery Co.* v. *Bishop Auckland, &c. Co., Ltd.*, supra, per Lord Macnaghten at p. 313; but while this case destroyed the authority of *Consett Waterworks* v. *Ritson*, 22 Q. B. D. 318, in which a lord of a manor, to whom minerals had been reserved under an Inclosure Act, was held to be entitled to work them so as to damage the surface, this case still governs rights arising under the same Act and under the same circumstances: *Consett Industrial, &c. Society* v. *Consett Iron Co.*, 1922, 2 Ch. 135. As to the right of support for a railway from minerals lying under lands outside the statutory limit of forty yards, see *Howley Park Coal, &c. Co.* v. *L. & N. W. Ry. Co.*, 1913, A. C. 11. As to what provisions will confer the right to let down the surface, see *Rowbotham* v. *Wilson*, ubi sup.; *Smith* v. *Darby*, L. R. 7 Q. B. 716; *Aspden* v. *Seddon*, L. R. 10 Ch. 394 (*S. C.*, on proceedings to recover compensation, 1 Ex. D. 496); *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, 1909, 1 Ch. 37; affirmed, 1910, A. C. 381; *Brewer* v. *Rhymney Iron Co.*, 1910, 1 Ch. 766, 770; *Beard* v. *Moira Colliery Co., Ltd.*, 1915, 1 Ch. 257; *Jones* v. *Consolidated Anthracite Collieries, Ltd.*, 1916, 1 K. B. 123; *Davies* v. *Powell Duffryn Steam Coal Co.*, 1917, 1 Ch. 488 (see *S. C.*, 1918, A. C. 555, allowing a new trial, and as to the new trial, see 91 L. J. Ch. 40); *Westhoughton U. D. C.* v. *Wigan Coal and Iron Co.*, 1919, 1 Ch. 159; *Welldon* v. *Betterley Co.*, 1920, 1 Ch. 130.

(*n*) *Bell* v. *Wilson*, L. R. 1 Ch. 303; *Hext* v. *Gill*, L. R. 7 Ch. 699, 713 *sq.*

(*o*) Black. Comm. 18; *Newton, Chambers & Co., Ltd.* v. *Hall*, 1907, 2 K. B. 446, 452; *Mitchell* v. *Moseley*, 1914, 1 Ch. 436; above, p. 395. Exceptions occur (1) upon conveyances of lands acquired subject to the provisions of the Railways Clauses Act, 1845, or the Waterworks Clauses Act, 1847 (above, p. 396, n. (*a*)); (2) upon the enfranchisement of copyholds when effected by virtue of the powers given by the Copyhold Acts, 1841, 1852, 1858, or 1894 (see stats. 4 & 5 Vict. c. 35, ss. 13, 56 *sq.*, 82; 15 & 16 Vict. c. 51, s. 48; 21 & 22 Vict. c. 94, s. 14; 57 & 58 Vict. c. 46, s. 23); (3) upon the sale for redeeming land tax of lands of ecclesiastical corporations under the Land Tax Redemption Acts (see 1 Dart, V. & P. 370, 5th ed.; 422, 6th ed.; 425, 7th ed.); and (4) where streets or roads vest by statute in some local authority

and where a title has been acquired under the Statute of Limitations (*p*) by adverse possession of the surface, a similar title to the mines and minerals thereunder will have been equally obtained (*q*). But after mines have once been severed from the surface, they remain distinct therefrom as separate corporeal hereditaments (*r*); the title thereto is no longer affected by any act of disposition or possession of the surface; and it is not lost by any mere omission to enter upon or work the mines (*s*). In such case the acquisition, subsequent to the severance, of a new title to the surface under the Statute of Limitations, will not of itself disturb the title to the mines (*t*). If, however, the mines severed be actually entered upon and held by a trespasser in such a way that he keeps possession of them, he will in due time obtain a good title under the statute (*u*). It is not sufficient, however, for a trespasser merely to enter on a mine and take coal or other minerals away; he cannot get a title to a mine, as a corporeal hereditament, unless he remain in possession of it, as such, for the statutory period (*x*). And the retention of possession of some particular mine or seam of coal, or some part thereof, will not confer a title under the

Mines once severed remain distinct from the surface.

Title to severed mines by adverse possession.

for the purposes only of exercising the powers thereby conferred on them in respect of the surface (see below, p. 402).

(*p*) 3 & 4 Will. IV. c. 27, amended by 37 & 38 Vict. c. 57.

(*q*) *Thew* v. *Wingate*, 10 B. & S. 714, n.; *Seddon* v. *Smith*, 36 L. T. N. S. 168; Williams on Commons, 152-154.

(*r*) The owner of the mines or *strata* so severed is therefore entitled to use the spaces left when the minerals have been worked out for any purpose he may please, such as the carriage of minerals gotten from under adjoining lands; *Proud* v. *Bates*, 11 Jur. N. S. 441; *Batten Pooll* v. *Kennedy*, 1907, 1 Ch. 256. It should be noted that the reservation, upon a conveyance of land, of the mere right to get the coal or other minerals thereunder, is an entirely different thing from an exception of the mines and only confers on the grantee a *profit à prendre*, which is an incorporeal hereditament; *Sutherland* v. *Heathcote*, 1892, 1 Ch. 475; and see Williams on Commons, 219.

(*s*) *Seaman* v. *Vawdrey*, 16 Ves. 390, 392; *Norway* v. *Rowe*, 19 Ves. 144, 156; *Cardigan* v. *Armitage*, 2 B. & C. 197; *McDonnell* v. *McKinty*, 10 Ir. L. R. 514; *Smith* v. *Lloyd*, 9 Ex. 562; *Trustees, &c. Agency Co., Ltd.* v. *Short*, 13 App. Cas. 793, 799; Williams on Commons, 216-219; Davidson, Prec. Conv. vol. ii. pt. i. p. 489, n., 4th ed.

(*t*) See previous note; McSwinney on Mines, 533, 4th ed.

(*u*) Hall, V.-C., *Ashton* v. *Stock*, 6 Ch. D. 719, 726; *Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. 186; *Glyn* v. *Howell*, 1909, 1 Ch. 666, 675 *sq.* So also where minerals are embedded in the surface soil and gotten by surface workings, as gravel obtained by digging in gravel pits or stone by quarrying, a title under the Statute of Limitations may be acquired by keeping possession of them, along with the surface, for the necessary period; *Smith* v. *Stocks*, 38 L. J. Q. B. 306.

(*x*) *Dartmouth* v. *Spittle*, 24 L. T. N. S. 67; *Ashton* v. *Stock*, ubi sup.; *Thompson* v. *Hickman*, 1907, 1 Ch. 550.

Statute of Limitations to any other mine or seam lying beneath the mine so possessed or to any other part of that mine than so much thereof as has been in the trespasser's actual possession (*y*). The reader will remember that, in the absence of any custom to the contrary, all mines and minerals in and under copyhold lands belong to the lord, though the tenant has *possession* of them, and neither party can work them without the other's consent (*z*). Such mines and minerals pass to the tenant upon an enfranchisement made by a conveyance of the freehold in fee under the general law (*a*), unless of course they are expressly excepted: but they do not pass upon an enfranchisement (whether voluntary or compulsory) effected under the powers given by the Copyhold Acts, unless specially comprised therein (*b*).

Mines under copyholds.

Soil of roads.

At common law, it is presumed that the soil of all roads, whether highways or private ways, running through and enclosed on both sides by one man's land belongs to him (*c*); that a conveyance of the lands on both sides of the road includes the soil of the road (*d*); and that a conveyance by him of the land on one side of the road includes the soil of the nearest half, up to the middle of the road (*e*). Where such roads divide the lands of different owners, the presumption is that the owner of the land on each side of the road is entitled to the soil of that part of the road which adjoins his land up to the middle of the road; that any strips of waste land lying by the side

(*y*) *Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. 186, 189; *Glyn* v. *Howell*, 1909, 1 Ch. 666.

(*z*) *Winchester* v. *Knight*, 1 P. W. 406; *Bourne* v. *Taylor*, 10 East, 189; *Lewis* v. *Branthwaite*, 2 B. & Ad. 437; *Keyes* v. *Powell*, 2 E. & B. 132; *Eardley* v. *Granville*, 3 Ch. D. 826, 832, 833; 1 Scriv. Cop. 508 *sq.*, 3rd ed.; Wms. Real Prop. 355, 13th ed.; 506, 23rd ed.; and cf. *Inland Revenue Commissioners* v. *Joicey* (No. 2), 1913, 1 K. B. 458 (custom for lord to work minerals by underground operations without letting down the surface). If the lord have by custom a right to enter and get the mines, he is not entitled to use the spaces left where the minerals have been worked out for any other purposes than such as are incidental to exercising this right, without the tenant's consent; *Eardley* v. *Granville*, 3 Ch. D. 826; cf. above, p. 399, n. (*r*).

(*a*) 1 Scriv. Cop. 25, 3rd ed.; above, p. 398; and see Davidson, Prec. Conv. vol. ii. pt. i. p. 386, n., 4th ed.

(*b*) See above, p. 398, n. (*o*).

(*c*) *Salisbury* v. *Great Northern Ry. Co.*, 5 C. B. N. S. 174; *Harrison* v. *Rutland*, 1893, 1 Q. B. 142; *Hickman* v. *Maisey*, 1900, 1 Q. B. 752.

(*d*) See *Salisbury* v. *Great Northern Ry. Co.*, ubi sup.

(*e*) See cases cited in note (*g*), p. 401, below.

of the road belong to the owner of the adjoining close (*f*); and that any conveyance of the adjoining land carries with it the soil of one half of the road (*g*). And the same presumption arises in the case of a contract of sale of land as in that of a conveyance (*h*). These presumptions, however, may be rebutted by evidence that the ownership of the soil is not in the person or persons in whom, but for such evidence, it would be presumed to be (*i*), or that it was not the intention of the conveying parties to assure any part of the soil of the road (*k*). Whenever any conveyance is to be made of any land adjoining a road, the draftsman should take great care to make it unmistakably plain, whether any part of the soil of the road is intended to pass or not. Under the Public Health Act, 1875 (*l*), the

(*f*) *Doe* d. *Pring* v. *Pearsey*, 7 B. & C. 304; *Scoones* v. *Morrell*, 1 Beav. 251; *Holmes* v. *Bellingham*, 7 C. B. N. S. 329 (as to private roads); *City of London Land Tax Commrs.* v. *Central London Ry. Co.*, 1913, A. C. 364. As to cases where a road adjoins an open common, see the first two cases cited in note (*i*), below. It should be noted that, where a high road, having unmetalled strips of land on either side of it, runs between fences, and there is nothing to show that the fences are not the boundaries of the highway, the presumption is that the public right of way extends over the whole of the land between the fences; *R.* v. *United Kingdom Telegraph Co.*, 6 L. T. N. S. 378; *Harvey* v. *Truro Rural Council*, 1903, 2 Ch. 638; *Offin* v. *Rochford Rural District Council*, 1906, 1 Ch. 342; cf. *Neeld* v. *Hendon Urban District Council*, 81 L. T. 406; *Belmore* v. *Kent County Council*, 1901, 1 Ch. 873; see also *Copestake* v. *West Sussex County Council*, 1911, 2 Ch. 331.

(*g*) *Simpson* v. *Dendy*, 8 C. B. N. S. 433, affd. 7 Jur. N. S. 1058; *Berridge* v. *Ward*, 10 C. B. N. S. 400 (where the land conveyed was described by reference to a plan not including any part of the road); *Re White's Charities*, 1898, 1 Ch. 659; and see *London & North Western Ry. Co.* v. *Westminster Corpn.*, 1902, 1 Ch. 269, 279, affirmed, 1905, A. C. 426, 428, 429, 438; *Thames Conservators* v. *Kent*, 1918, 2 K. B. 272; *City of London Land Tax Commissioners* v. *Central London Railway Co.*, 1913, A. C. 364.

(*h*) *Re Popple and Barratt's Contract*, 25 W. R. 248; *City of London Land Tax Commissioners* v. *Central London Railway Co.*, 1913, A. C. 364.

(*i*) *Grose* v. *West*, 7 Taunt. 39; *Doe* v. *Kemp*, 2 Bing. N. C. 102; *Beckett* v. *Leeds Corpn.*, L. R. 7 Ch. 421; *Haigh* v. *West*, 1893, 2 Q. B. 19, 20.

(*k*) *Salisbury* v. *Great Northern Ry. Co.*, 5 C. B. N. S. 174; *Plumstead Board of Works* v. *British Land Co.*, L. R. 10 Q. B. 16, 203, 206; *Leigh* v. *Jack*, 5 Ex. D. 264; *Pryor* v. *Petre*, 1894, 2 Ch. 11; *Mappin* v. *Liberty & Co., Ltd.*, 1903, 1 Ch. 118. The above presumptions have no application in the case where a railway runs through one man's land, or (as it appears) between the lands of different owners; *Thompson* v. *Hickman*, 1907, 1 Ch. 550, 556.

(*l*) Stat. 38 & 39 Vict. c. 55, s. 149. By s. 4, *street* includes any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley or passage, whether a thoroughfare or not.

Streets within an urban district.

surface soil of all streets, which are or become highways repairable by the inhabitants at large within any urban district, vests in the urban sanitary authority to the depth necessary for exercising the powers conferred by the Act; but the sub-soil, including all mines and minerals therein, remains vested in the person or persons entitled (save as provided by the Act) to the land, which is the site of the street (*m*). Under the Metropolis Management Act, 1855 (*n*), the surface soil of all streets in the metropolis, which are highways, vests in the local authority to the same extent (*o*). Under the Public Health (London) Act, 1891 (*p*), however, the sub-soil of any road, exclusive of the footway adjoining any building or the curtilage of a building, is vested in the local sanitary authority for the purposes of making such public conveniences as are specified in sect. 44 of that Act. This enactment makes the sanitary authority the owner of such conveniences when made, but does not appear to confer any greater interest in the sub-soil than is necessary for the purposes specified (*q*). Under the Local Government Act, 1888 (*r*), all main roads within the meaning of the Highways and Locomotives (Amendment) Act, 1878 (*s*), vest in the County Council, except where the urban sanitary authority retain the powers and duties of maintaining and repairing such road (*t*). It has been held that this enactment does not make the County Council the owner of strips of waste land lying by the side of such roads, so as to entitle them to

Mines and minerals thereunder.

Streets in the metropolis.

Public conveniences under roads in London.

Main roads.

(*m*) *Coverdale* v. *Charlton*, 4 Q. B. D. 104, 121; *Tunbridge Wells Corpn.* v. *Baird*, 1896, A. C. 434; *Finchley Electric Light Co.* v. *Finchley Urban District Council*, 1903, 1 Ch. 437; *Wednesbury Corpn.* v. *Lodge Holes Colliery Co., Ltd.*, 1905, 2 K. B. 823, 826; 1907, 1 K. B. 78, 89, 90; 1908, A. C. 323; *Foley's Charity Trustees* v. *Dudley Corpn.*, 1910, 1 K. B. 317, 322, 324, 325. As to how much of the soil of a highway is included in the dedication to the public, see *Schweder* v. *Worthing Gas Light and Coke Co.* (No. 2), 1913, 1 Ch. 118.

(*n*) Stat. 18 & 19 Vict. c. 120, s. 96. By sect. 250, *street* is defined in the same way as in the Public Health Act, 1875; see note (*l*), p. 401, above.

(*o*) *Rolls* v. *St. George's Vestry, Southwark*, 14 Ch. D. 785; *Wandsworth Board of Works* v. *United Telephone Co.*, 13 Q. B. D. 904; *Battersea Vestry* v. *County of London, &c. Lighting Co., Ltd.*, 1899, 1 Ch. 474.

(*p*) Stat. 54 & 55 Vict. c. 76.

(*q*) *London and North Western Ry. Co.* v. *Westminster Corpn.*, 1902, 1 Ch. 269, affirmed 1905, A. C. 426; *Westminster Corpn.* v. *Johnson*, 1904, 2 K. B. 737. See cases cited in note (*m*), above.

(*r*) Stat. 51 & 52 Vict. c. 41, s. 11 (1, 6).

(*s*) Stat. 41 & 42 Vict. c. 77, s. 13.

(*t*) See *Finchley Electric Light Co.* v. *Finchley Urban District Council*, 1902, 1 Ch. 866, reversed 1903, 1 Ch. 437.

take the herbage thereof (*u*): but it appears to vest in them the surface soil of the metalled road and any footpath lying by its side (*x*), so far as is necessary for the exercise of the powers vested in them (*y*).

Soil of rivers.

The like presumptions are made with respect to the soil of rivers (where they are not tidal rivers) as with regard to the soil of roads (*z*). If the lands on both sides of the river belong to the same owner, it is presumed that he is the owner of the river-bed (*a*); that the whole of the river-bed passes on any conveyance or sale (*b*) of the lands on both sides of the river; and that one-half of the river-bed, up to mid-stream, passes by the conveyance or sale (*b*) of the land lying on one side of the river. And if the river divide the lands of different owners, it is presumed that each of them is the owner of that part of the river-bed which adjoins his own land, up to mid-stream, and that a conveyance or sale of the adjoining land carries with it the ownership of half the river-bed (*c*). These presumptions may equally be rebutted by evidence to the contrary, as in the case of roads (*d*). Where there is an ancient island in the middle of a river, and the lands on either bank of the river belong to different owners, the presumption that each riparian proprietor is the owner of half the river-bed applies only as far as the middle of the stream running between either bank and the island, and not so as to raise any presumption as to the ownership of the island (*e*). It must not be forgotten that,

Island in a river.

(*u*) *Curtis* v. *Kesteven County Council*, 45 Ch. D. 504.
(*x*) See *Derby County Council* v. *Matlock Bath, &c. Urban District*, 1896, A. C. 315.
(*y*) See cases cited in note (*m*), p. 402, above.
(*z*) Above, pp. 400, 401.
(*a*) As to what is the bed of a river, see *Thames Conservators* v. *Smeed*, 1897, 2 Q. B. 334. With respect to the legal results of a river changing its course, see *Carlisle Corpn.* v. *Graham*, L. R. 4 Ex. 361; *Foster* v. *Wright*, 4 C. P. D. 438; *Hindson* v. *Ashby*, 1896, 2 Ch. 1.
(*b*) *Re Popple and Barratt's Contract*, 25 W. R. 248.
(*c*) *Lord* v. *Sydney Commrs.*, 12 Moo. P. C. 473; *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133; Kay, J., *Tilbury* v. *Silva*, 45 Ch. D. 98, 108; *Jones* v. *Llanrwst, &c. Council*, 1911, 1 Ch. 393, 401; *Maclaren* v. *A.-G. for Quebec*, 1914, A. C. 258, 272, 273; *Thames Conservators* v. *Kent*, 1918, 2 K. B. 272, 284 (ownership of towpath). These presumptions do not apply in the case of lands abutting on a canal, of which the surface soil belongs to other owners; *Chamber Colliery Co.* v. *Rochdale Canal Co.*, 73 L. T. 258.
(*d*) *Devonshire* v. *Pattinson*, 20 Q. B. D. 263; above, p. 401.
(*e*) *Great Torrington Commons Conservators* v. *Moore Stevens*, 1903, 1 Ch. 347.

Owner of several fishery presumed to be owner of the soil.

where there has been a grant of a several fishery in any river, it is presumed, in the absence of evidence to the contrary, that the owner of the fishery is the owner of the soil of the river (*f*).

Soil of tidal rivers.

In the case of tidal and navigable (*g*) rivers, estuaries and inland arms of the sea, the presumption is that the soil of the river-bed or sea-bed up to high-water mark belongs to the Crown (*h*);

Public right of navigation.

but such ownership is subject to the public right of navigation (*i*).

Seashore.

The Crown is also presumably entitled to the soil of the seashore below high-water mark of ordinary tides, between the spring and the neap (*k*).

Foreshore.

But a subject may have become the owner of the soil of the foreshore—that is, the land lying between high and low-water mark of medium tides (*l*)—by grant from the Crown either conveying it in express terms (*m*), or

(*f*) See *Marshall* v. *Ulleswater Steam Navigation Co., Ltd.*, 3 B. & S. 732; *A.-G.* v. *Emerson*, 1891, A. C. 649; *Hindson* v. *Ashby*, 1896, 2 Ch. 1, 11, 20; *Eckroyd* v. *Coulthard*, 1897, 2 Ch. 554, 565, 570; *Hanbury* v. *Jenkins*, 1901, 2 Ch. 401, 411; *Fitzhardinge* v. *Purcell*, 1908, 2 Ch. 139, 146, 161.

(*g*) As to the meaning of *navigable*, see *Ilchester* v. *Raishleigh*, 61 L. T. 477.

(*h*) *Colchester Corpn.* v. *Brooke*, 7 Q. B. 339, 374; *Malcomson* v. *O'Dea*, 10 H. L. C. 593, 618; *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192, 207; *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662, 682; *North Shore Ry. Co.* v. *Pion*, 14 App. Cas. 612, 621; *A.-G.* v. *Emerson*, 1891, A. C. 649, 653; *Fitzhardinge* v. *Purcell*, 1908, 2 Ch. 139, 146.

(*i*) See cases cited in previous note, and as to the limits of the public right of navigation, *Denaby, &c. Collieries, Ltd.* v. *Anson*, 1911, 1 K. B. 171. Inland or non-tidal rivers may by immemorial user or by dedication be subject to a public right of navigation similar to a public right of way along a road: see *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839; *Bourke* v. *Davis*, 44 Ch. D. 110, 120-124; *Smith* v. *Andrews*, 1891, 2 Ch. 678, 689, n., 695-697; *Simpson* v. *A.-G.*, 1904, A. C. 476.

(*k*) *A.-G.* v. *Chambers*, 4 De G., M. & G. 206; *A.-G.* v. *Emerson*, 1891, A. C. 649, 653. Where the sea gradually encroaches or recedes, the soil, over which the Crown title extends, is altered accordingly; but a sudden irruption or dereliction of the sea does not cause any change of title to the soil so submerged or left dry; 2 Black. Comm. 262; *R.* v. *Yarborough*, 3 B. & C. 91, 2 Bligh, N. S. 147, 5 Bing. 163; *Re Hull and Selby Ry.*, 5 M. & W. 327; *Mercer* v. *Denne*, 1905, 2 Ch. 538, 579, 582, 584; Wms. Real Prop. 330, 13th ed.; 464, 23rd ed.; *A.-G. of Southern Nigeria* v. *John Holt & Co.*, 1915, A. C. 599 (artificial reclamation does not change the ownership of the soil).

(*l*) *Scratton* v. *Brown*, 4 B. & C. 485, 495; Alderson, B., *Re Hull and Selby Ry.*, 5 M. & W. 327, 332; *A.-G.* v. *Emerson*, 1891, A. C. 649, 653; *Mellor* v. *Walmesley*, 1905, 2 Ch. 164, 177-180.

(*m*) *Mace* v. *Philcox*, 15 C. B. N. S. 600; *Llandudno Urban District Council* v. *Woods*, 1899, 2 Ch. 705; *Liverpool, &c. Steamship Co.* v. *Mersey Trading Co., Ltd.*, 1909, 1 Ch. 209; and see *Scratton* v. *Brown*, 4 B. & C. 485, 495 *sq.*

presumed from the exercise of long-continued and uninterrupted acts of ownership to have included it (*n*), or to have been made (*o*). And the owner of a several fishery extending over the foreshore is presumed to be the owner of the soil thereof (*p*). A subject may also have derived from the Crown a title to the soil of the seashore or of a tidal river below the low-water mark: but in all such cases the owner holds subject to the right of public navigation (*q*). And if stone or shingle on part of the foreshore granted to a subject form a natural barrier against the incursion of the sea, he is not entitled to remove it (*r*). Where land conveyed is described as bounded by the seashore, that means by the inland limit of the foreshore, *i.e.*, high-water mark of medium tides; and there is no presumption that any part of the foreshore is included in the conveyance (*s*). The owner of land abutting on the seashore or situated on the bank of a tidal and navigable river, has the like right of access over the foreshore to and from the sea or river for the purpose of navigation and otherwise as is enjoyed by the owner of land on the bank of a non-tidal river (*t*). But the public have no general right to use the foreshore (whether in the hands of the Crown or of a subject) for bathing or other purposes (save such as may be incident to the proper exercise of the public rights of navigation and fishing), or to pass and repass over it when not covered by the sea (*u*). The Crown is not entitled of common right to the soil of any inland lake, whether navi-

Several fishery over foreshore.

Land below low-water mark.

Foreshore, where a barrier against the sea.

Land bounded by the seashore.

Riparian owner's right of access to the sea.

No public right to walk on the foreshore.

Inland lake.

(*n*) *Calmady* v. *Rowe*, 6 C. B. 861; *Beaufort* v. *Swansea*, 3 Ex. 413; *A.-G. of Ireland* v. *Vandeleur*, 1907, A. C. 369, 370; *Fitzhardinge* v. *Purcell*, 1908, 2 Ch. 139.

(*o*) *A.-G.* v. *Emerson*, 1891, A. C. 649, 653.

(*p*) *A.-G.* v. *Emerson*, *Fitzhardinge* v. *Purcell*, ubi sup.

(*q*) See cases cited in note (*h*) to p. 404, above; *The Swift*, 1901, P. 168, 173.

(*r*) *A.-G.* v. *Tomline*, 14 Ch. D. 58, followed *Musselburgh Real Estate Co., Ltd.* v. *Musselburgh (Provost)*, 1905, A. C. 491.

(*s*) *Mellor* v. *Walmesley*, 1905, 2 Ch. 164.

(*t*) *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *A.-G. of Straits Settlements* v. *Wemyss*, 13 App. Cas. 192; *North Shore Ry. Co.* v. *Pion*, 14 App. Cas. 612; *Mellor* v. *Walmesley*, 1905, 2 Ch. 164, 181.

(*u*) *Blundell* v. *Catterall*, 5 B. & A. 268; *Llandudno Urban District Council* v. *Woods*, 1899, 2 Ch. 705; *Brinckman* v. *Matley*, 1904, 2 Ch. 313; *Fitzhardinge* v. *Purcell*, 1908, 2 Ch. 139, 165 *sq.* The foreshore may be subject through immemorial user to the right of the owners of fishing boats and other craft to fix moorings in the soil; *A.-G.* v. *Wright*, 1897, 2 Q. B. 318. And there may be a good custom for fishermen to dry their nets on land near the sea; *Mercer* v. *Denne*, 1904, 2 Ch. 534; 1905, 2 Ch. 538.

gable or not; and it is a question whether the presumptions as to the soil of inland rivers (*x*) apply to inland lakes (*y*).

Water rights in natural rivers.

The owner of the land forming the bank of any natural river or stream has the right, as incident to such ownership and not as an easement (*z*), to have the water flow down in its natural state, neither increased nor diminished in quantity (save only so far as may be occasioned by the lawful user of the owners higher up the stream) (*a*) and unpolluted (*b*). But the owner of any land higher up the stream may enjoy a prescriptive right in the nature of an easement to abstract from the stream a larger quantity of water than he is allowed as riparian owner to take for his own use (*c*), or to discharge extraneous water or other matter into the stream (*d*). But any prescriptive right

(*x*) Above, p. 403.

(*y*) *Bristow* v. *Cormican*, 3 App. Cas. 641, 658, 665-667; and see *Johnston* v. *O'Neill*, 1911, A. C. 552.

(*z*) *Shury* v. *Piggot*, 3 Bulst. 339.

(*a*) *Wright* v. *Howard*, 1 Sim. & St. 190, 203; *Mason* v. *Hill*, 5 B. & Ad. 1, 17 *sq.*; *Embrey* v. *Owen*, 6 Ex. 353; *Miner* v. *Gilmour*, 12 Moo. P. C. 131, 156; *Chasemore* v. *Richards*, 7 H. L. C. 349, 382; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, L. R. 7 H. L. 697, 704, 709; Blackburn, L. A., *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839, 854; *Ormerod* v. *Todmorden Mill Co.*, 11 Q. B. D. 155; *Roberts* v. *Gwyfai District Council*, 1899, 2 Ch. 608; *Bradford Corpn.* v. *Ferrand*, 1902, 2 Ch. 655, 660; *McCartney* v. *Londonderry, &c. Ry. Co., Ltd.*, 1904, A. C. 301; *John White & Sons* v. *J. & M. White*, 1906, A. C. 72, 80; *Jones* v. *Llanrwst, &c. Council*, 1911, 1 Ch. 393; *Stollmeyer* v. *Trinidad Lake Petroleum Co.*, 1918, A. C. 485. Any riparian owner may take water from the stream for his own domestic purposes, such as drinking, washing and watering his cattle, and for the reasonable irrigation of his land; and he is also entitled to divert the water from the stream for such purposes as the supply of water power to a mill erected on his land, provided always that he return the water so used to the stream, and do not substantially interfere with the rights of the other riparian proprietors to the natural flow of the water: but he is not entitled to divert the water to a place outside his riparian tenement and consume it there for purposes unconnected with such tenement: see the cases above cited; *Kensit* v. *Great Eastern Ry. Co.*, 27 Ch. D. 122. See *Greenock Corporation* v. *Caledonian Railway*, 1917, A. C. 556, as to the liability for damage caused, through flooding or otherwise, by interference with the natural course of a stream; and see the Rivers Pollution Prevention Acts, 1876 and 1893 (stats. 39 & 40 Vict. c. 75; 56 & 57 Vict. c. 31); *Butterworth* v. *West Riding of Yorkshire Rivers Board*, 1909, A. C. 45.

(*b*) *Wood* v. *Waud*, 3 Ex. 748; *John Young & Co.* v. *Bankier Distillery Co.*, 1893, A. C. 691, 697, 698, 701; *Stollmeyer* v. *Petroleum Development Coy.*, 1918, A. C. 498; and cases cited in previous note.

(*c*) See *Wright* v. *Howard*, 1 S. & S. 190, 203; *Race* v. *Ward*, 2 E. & B. 702; Williams on Commons, 305, 331, 332.

(*d*) See *Crossley & Sons, Ltd.* v. *Lightowler*, L. R. 2 Ch. 478; *Baxendale* v. *McMurray*, ib. 790; *McIntyre Bros.* v. *McGavin*, 1893, A. C. 268; Williams on Commons, 336.

to discharge such matter into a stream does not absolve its owner from the necessity of observing the requirements of the Rivers Pollution Prevention Act, 1876 (*e*). The right to the natural flow of water is confined to such water as flows in a known and defined stream or channel, and does not extend to surface water not so flowing (*f*), or to underground water merely percolating through the strata in no known channels (*g*). If, however, a stream of water flow underground in a defined and known channel and afterwards emerge on to the surface, the owners of land lower down the stream will be entitled to the natural flow of the water down to them (*h*).

Surface or underground water not flowing in a known and defined channel.

The right to the flow of water along an artificial watercourse depends on entirely different principles; it is not enjoyed of common right as incident to the ownership of the land through which the water flows, but is an easement arising by grant or prescription (*i*). Where an artificial watercourse is obviously made for a particular and temporary purpose only, as for draining a mine or land or for supplying water power to a water mill, the owner of any land lower down the stream, as he takes the water with notice of such purpose, does not acquire by reason of such enjoyment, though long continued, any right to the continuance of the flow of water (*k*). But where the circumstances are such that it appears that the watercourse must have been constructed for the mutual benefit of the owners of the lands, through which it flows, a right to the continuance of the water supply may be acquired, as an easement, through long continued enjoyment (*l*). And in the case of an ancient artificial

Water rights in artificial watercourses.

(*e*) Stat. 39 & 40 Vict. c. 75, ss. 2, 3, 4; see *Butterworth* v. *West Riding of Yorkshire Rivers Board*, 1909, A. C. 45, 48-50, 54, 56, 57.

(*f*) *Rawstron* v. *Taylor*, 11 Ex. 369; *Bradford Corpn.* v. *Ferrand*, 1902, 2 Ch. 655, 660.

(*g*) *Chasemore* v. *Richards*, 7 H. L. C. 349; *Bradford Corpn.* v. *Pickles*, 1895, A. C. 587; *Bradford Corpn.* v. *Ferrand*, 1902, 2 Ch. 655.

(*h*) See *Dickinson* v. *Grand Junction Canal*, 7 Ex. 282, 300, 301; *Chasemore* v. *Richards*, 7 H. L. C. 349, 374, 384; *Bradford Corpn.* v. *Ferrand*, 1902, 2 Ch. 655, 665, in which case it was held that there is no right to the flow of water along an underground channel, which may be defined, but is not known.

(*i*) *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, 4 App. Cas. 121, 126-128; Williams on Commons, 305, 311, 338, 342.

(*k*) *Arkwright* v. *Gell*, 5 M. & W. 203; *Wood* v. *Waud*, 3 Exch. 748; *Greatrex* v. *Hayward*, 8 Ex. 291; *Burrows* v. *Lang*, 1901, 2 Ch. 502.

(*l*) *Sutcliffe* v. *Booth*, 9 Jur. N. S. 1037; *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, 4 App. Cas. 121, 128. Such an easement may be gained either by prescription at common law alleging immemorial user, or through twenty years' enjoyment from which a

watercourse of which the exact origin is unknown, it will be presumed in such circumstances that it was constructed on the terms that the various riparian owners should enjoy the like rights to the flow of water, and also (it seems) in the bed of the stream, as they would have if the stream were natural (*m*). Of course an artificial watercourse flowing through the lands of more than one owner is in its inception a burden as well as a benefit to the landlord lower down the stream; that is to say, the landowner higher up can have no right to discharge the water on to the land lower down without acquiring an easement for that purpose (*n*). Where such a right exists for pure water, it appears that the landowner higher up can have no right to discharge into the watercourse extraneous matter which pollutes the water, unless he has acquired an enlarged easement entitling him to do so (*o*). And if the circumstances be such that the landowner lower down has acquired the right to the continuance of the flow of water, he will have the like right to have the water come down to him unpolluted as if the stream were natural (*p*).

Rights of fishing and sporting.

Rights of fishing in tidal waters.

On the purchase of landed estates in the country it is of course a matter of great importance to ascertain that the title to the rights of fishing and sporting is clear. The right of fishing in all tidal waters, whether of the sea-coast or of any tidal river, estuary or inlet of the sea, is *primâ facie* public (*q*), the public being entitled to exercise this right by virtue of the Crown's ownership of the soil covered by such tidal waters, which ownership is subject to the public rights of navigation

lost grant can be presumed, or through twenty or forty years' enjoyment under the Prescription Act (stat. 2 & 3 Will. IV. c. 71), s. 2; see Williams on Commons, 305-310.

(*m*) *Baily* v. *Clark*, 1902, 1 Ch. 649; *Whitmores* (*Edenbridge*), *Ltd.* v. *Stanford*, 1909, 1 Ch. 427.

(*n*) See *Wright* v. *Williams*, 1 M. & W. 77.

(*o*) See *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L. R. 1 Ch. 349; *Crossley & Sons, Ltd.* v. *Lightowler*, L. R. 2 Ch. 478; *Baxendale* v. *McMurray*, ib. 790.

(*p*) See *Magor* v. *Chadwick*, 11 A. & E. 571; Williams on Commons, 341, 342.

(*q*) *Ward* v. *Creswell*, Willes, 265; *Bagott* v. *Orr*, 2 Bos. & P. 472; *Blundell* v. *Catterall*, 5 B. & A. 268, 276, 294, 301, 304; *Malcomson* v. *O'Dea*, 10 H. L. C. 593, 618; *Carlisle Corpn.* v. *Graham*, L. R. 4 Ex. 361, 367, 368; *Brinckman* v. *Matley*, 1904, 2 Ch. 313, 315, 325, 327; *Fitzhardinge* v. *Purcell*, 1908, 2 Ch. 139, 165-167; *A.-G. for British Columbia* v. *A.-G. for Canada*, 1914, A. C. 153, 168-171; Williams on Commons, 265, 266.

thereover and fishing therein (*r*). But the Crown had power, until deprived of it by Magna Carta (*s*), to grant to any individual subject a several fishery in such tidal waters, that is, the exclusive right of fishing therein; and there are many several fisheries existing by virtue of such grants in tidal waters at the present day (*t*). The right of fishing in non-tidal waters is an incident of the ownership of the soil covered by them (*u*). If this soil belong entirely to one owner, the right of fishing is *primâ facie* exclusively his; and where the soil belongs to more owners than one (as in the case of the opposite banks of a river and the adjoining halves of the river-bed belonging to different persons (*x*)), they have *primâ facie* the exclusive right of fishing between them, each being entitled (it appears) to fish the waters covering the soil, which he owns (*y*). The right of fishing in non-tidal waters may, however, have become vested by grant or prescription, either wholly or partially, in some other person than the owner of the soil covered by them. A right of fishing so acquired apart from the ownership of the soil is a *profit à prendre* (*z*), and may take the form either of a several fishery, which is the right of fishing to the exclusion of all others (*a*), or of common of piscary, which is the right to fish in common with others (*b*). We have seen that it is presumed that the

Several fishery in tidal waters.

Rights of fishing in non-tidal waters.

Rights of fishing severed from the ownership of the soil.

Several fishery.

Common of piscary.

(*r*) Above, pp. 404, 405. (*s*) Stat. 9 Hen. III. c. 16.

(*t*) *Somerset* v. *Fogwell*, 5 B. & C. 875, 884; *Malcomson* v. *O'Dea*, 10 H. L. C. 593, 618; *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192, 209; *Carlisle Corpn.* v. *Graham*, L. R. 4 Ex. 361; *Northumberland* v. *Houghton*, L. R. 5 Ex. 127; *Neill* v. *Devonshire*, 8 App. Cas. 135, 158, 177-180; *A.-G.* v. *Emerson*, 1891, A. C. 649; *Fitzhardinge* v. *Purcell*, 1908, 2 Ch. 139; Williams on Commons, 268. Several fisheries so granted are, however, subject to the public right of navigation; see cases cited above, p. 404, n. (*h*).

(*u*) Hale de Jure Maris, Ch. 1, p. 1 (see Hargrave's Law Tracts); *The Banne*, Davis, 55, 56, 57; 2 Black. Comm. 39; *Marshall* v. *Ulleswater Steam Navigation Co.*, 3 B. & S. 732, 745, 748; *Bristow* v. *Cormican*, 3 App. Cas. 641, 664; *Pearce* v. *Scotcher*, 9 Q. B. D. 162, 165, 167; Bowen, L. J., *Blount* v. *Layard*, 1891, 2 Ch. 681, n., 689, n.; *Hindson* v. *Ashby*, 1896, 2 Ch. 1, 9, 10; *Eckroyd* v. *Coulthard*, 1897, 1 Ch. 554, 566; 1898, 2 Ch. 358, 366, 373; *A.-G. for British Columbia* v. *A.-G. for Canada*, 1914, A. C. 153, 167, 168.

(*x*) Above, p. 403.

(*y*) See authorities cited in note (*u*), above; Williams on Commons, 269; Stuart Moore on Fisheries, 113; *Hanbury* v. *Jenkins*, 1901, 2 Ch. 401, 405, 415, 419, 421; *Chesterfield* v. *Harris*, 1908, 2 Ch. 397.

(*z*) Williams on Commons, 18; *Fitzgerald* v. *Firbank*, 1897, 2 Ch. 96.

(*a*) *Malcomson* v. *O'Dea*, 10 H. L. C. 593, 618, 619; *Hanbury* v. *Jenkins*, 1901, 2 Ch. 401, 411.

(*b*) Williams on Commons, 259; Stuart Moore on Fisheries, 32 *sq.*; *Chesterfield* v. *Harris*, 1908, 2 Ch. 397, 412, 418-424, 426-429; affirmed, 1911, A. C. 623.

owner of a several fishery is the owner of the soil covered by the waters over which his right of fishing extends (*c*): but there is no doubt that a several fishery may also exist as a separate incorporeal hereditament apart from the ownership of the soil (*d*). And it appears that, where there is a several fishery severed from the ownership of the soil, there may be appurtenant thereto a right of way along the banks of the river for the purpose of exercising the right of fishing (*e*). The public have no right of fishing in any non-tidal river, though navigable (*f*), and cannot acquire such right by user, for however long a period (*g*). The right of sporting over land, that is, the right of killing and taking away the game and other wild animals thereon, may be enjoyed either by virtue of some franchise derived from the Crown (such as a forest, a chase, a park, or a free warren), or as an incident of the ownership of the land (*h*), or as a separate incorporeal hereditament, in the nature of a *profit à prendre*, enjoyed through grant or prescription, independently of the ownership of the soil (*i*).

Right of sporting.

Lessee's rights of fishing and sporting.

It must not be forgotten that all rights of fishing and sporting, which are incident to the ownership of the soil of any land, are exerciseable by a lessee of the land for any term of lives or years or less in virtue of his occupation of the demised premises, unless these rights were expressly reserved to the lessor, his

(*c*) Above, p. 404.

(*d*) *Somerset* v. *Fogwell*, 5 B. & C. 875; Williams on Commons, 264; *Hanbury* v. *Jenkins*, 1901, 2 Ch. 401. A claim to a several fishery in gross cannot be established under the Prescription Act (stat. 2 & 3 Will. IV. c. 71); *Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687; see Williams on Commons, 1, 4, 5, 9, 11, 265. As to the legal effect upon a several fishery of a river changing its course, see cases cited above, p. 403, n. (*a*).

(*e*) *Hanbury* v. *Jenkins*, 1901, 2 Ch. 401.

(*f*) See above, p. 404, n. (*i*).

(*g*) *Hudson* v. *Macrae*, 4 B. & S. 585; *Hargreaves* v. *Diddams*, L. R. 10 Q. B. 582; *Pearce* v. *Scotcher*, 9 Q. B. D. 162; *Smith* v. *Andrews*, 1891, 2 Ch. 678.

(*h*) See *Case of Monopolies*, 11 Rep. 84b, 87b; Williams on Commons, 18, 82, 152, 228 *sq.*, 240-243; *Devonshire* v. *O'Connor*, 24 Q. B. D. 468.

(*i*) See *Wickham* v. *Hawker*, 7 M. & W. 63; *Ewart* v. *Graham*, 7 H. L. C. 331, 334, 335; *Hooper* v. *Clark*, L. R. 2 Q. B. 200; *Webber* v. *Lee*, 9 Q. B. D. 315; *Lowe* v. *Adams*, 1901, 2 Ch. 598. As to the difference between a mere licence and the grant of a *profit à prendre*, see *Wood* v. *Leadbitter*, 13 M. & W. 838, 844, 845; *Holford* v. *Bailey*, 13 Q. B. 426, 446; *Lowe* v. *Adams*, 1901, 2 Ch. 598, 601; and see *Grove* v. *Portal*, 1902, 1 Ch. 727; and as to the effect of the Judicature Acts, 1873, on *Wood* v. *Leadbitter*, supra, see *Hunt* v. *Picture Theatres, Ltd.*, 1915, 1 K. B. 1.

heirs and assigns upon the granting of the lease (*k*). A reservation of this kind in a lease is not an exception or a reservation in the strict legal sense of these words, but operates as a grant from the lessee of the *profit à prendre* specified (*l*); and such a grant, being of an incorporeal hereditament, is required at common law to be made by deed (*m*). It is therefore necessary that the lease should be by deed, and the lessee should execute it in order that the lessor may obtain the *legal* right to the privilege so purported to be reserved (*n*): though the lessor would enjoy the like right in *equity* without such execution (*o*). And it is requisite that the privilege should be expressed to be reserved to the lessor *and his heirs*, or to him *in fee simple*, in order that the *profit à prendre* so granted shall endure beyond the lessor's own life (*p*).

Waste land of a manor.

In buying a manor or any waste land of a manor, it should be borne in mind that the lord of the manor is entitled to the soil of any waste land of the manor, including any mines or minerals thereunder, and is consequently entitled to the right of sporting thereover (*q*), but such ownership is subject to all rights of common thereover of the freehold and copyhold tenants of the manor (*r*). Since the 21st of September, 1893, the lord's right of approvement under the Statutes of Merton and West-

Approvement of part of a common.

(*k*) Except, however, as to game, in the case of leases made before the 5th Oct. 1831; see stat. 1 & 2 Will. IV. c. 32, ss. 6-8; *Coleman* v. *Bathurst*, L. R. 6 Q. B. 366; *Pochin* v. *Smith*, 52 J. P. 4; *Jones* v. *Davies*, 86 L. T. 447; Wms. Pers. Prop. 21-27, 11th ed.; 49, 155-157, 17th ed.

(*l*) It is the general practice so to reserve the rights of sporting in granting leases of agricultural land; see Davidson, Prec. Conv. vol. v. pt. i. pp. 87, 215, 227, 228, 243, 260, 3rd ed.; Davidson's Concise Precedents, 412, 420, 19th ed. Such reservations are subject to the provisions of the Ground Game Acts, 1880 and 1906, stats. 43 & 44 Vict. c. 47; 6 Edw. VII. c. 21; see Wms. Pers. Prop. 155, 17th ed.

(*m*) *Bird* v. *Higginson*, 2 A. & E. 696, 704, 6 A. & E. 824; *Brigstocke* v. *Rayner*, 40 J. P. 245.

(*n*) *Doe* v. *Lock*, 2 A. & E. 705, 710, 743; *Wickham* v. *Hawker*, 7 M. & W. 63, 76, 77; *Ewart* v. *Graham*, 7 H. L. C. 331, 334, 335; *Proud* v. *Bates*, 11 Jur. N. S. 441; see however as to a reservation of the right to kill game, *R.* v. *Thurlstone*, 1 E. & E. 502.

(*o*) See *Lowe* v. *Adams*, 1901, 2 Ch. 598; *May* v. *Belleville*, 1905, 2 Ch. 605; Laws of England, x. 377, 401, §§ 678, 721 (by the writer).

(*p*) Litt. s. 1; Co. Litt. 9 a, b, 307 a; *Hewlins* v. *Shippam*, 5 B. & C. 221, 228, 229.

(*q*) Bract. fo. 227, 228; *Townley* v. *Gibson*, 2 T. R. 701; Williams on Commons, 103 *sq.*, 150-152, 212, 213, 240-243; *Lancashire* v. *Hunt*, 10 Times L. R. 310; above, pp. 393, n. (*k*), 410 and n. (*h*).

(*r*) See Williams on Commons, 2 *sq.*, 17, 24, 31 *sq.*, 103 *sq.*, 123, 150 *sq.*, 168 *sq.*, 170, 212 *sq.*

minster the Second (*s*) of any part of a common has been only exerciseable with the consent of the Board of Agriculture (*t*), since styled the Board of Agriculture and Fisheries, and now replaced by the Ministry of Agriculture and Fisheries (*u*). The lord of a manor has no right to enter upon any lands held by his freehold or copyhold tenants for the purpose of sporting thereover (*x*), or for any other purpose (*y*).

Right of lateral support.

Every landowner is entitled of common right, and as a natural incident of his ownership, to have his soil supported in its natural state by the soil of the adjacent lands (*z*). This right does not, however, entitle him to any additional support required for any buildings which he may erect on his land (*a*): but he may by grant, express or implied (*b*), or through long continued enjoyment, become entitled to such further support. The right to further lateral support for any buildings or additional buildings erected on any land may be acquired by twenty years' open and uninterrupted enjoyment: but conflicting opinions have been given by the judges and in the House of Lords on the question whether this right is a positive easement involving an actual physical burden on the supporting soil, a negative easement merely restricting the use of that soil, or simply an enlargement of the right of lateral support arising from the ownership of the land supported (*c*). When land is sold with any buildings erected thereon or for the purpose of erecting any buildings or additional buildings thereon, the vendor impliedly agrees to confer upon the purchaser the right of support for such buildings by any adjoining lands, which the vendor retains, and the purchaser is entitled to such right of support accordingly (*d*).

Sale of land with buildings or for building purposes.

(*s*) Stats. 20 Hen. III. c. 4; 13 Edw. I. c. 46; see Williams on Commons, 103 *sq.*

(*t*) Stat. 56 & 57 Vict. c. 57, s. 2, passed 22nd Sept. 1893.

(*u*) See above, p. 134, n. (*b*).

(*x*) *Pickering* v. *Noyes*, 4 B. & C. 639.

(*y*) See Wms. Real Prop. 7, 17, 27, 37, 39 and n. (*r*), 58, 65-67, 501-503, 23rd ed.

(*z*) See *Dalton* v. *Angus*, 6 App. Cas. 740; *New Moss Colly., Ltd.* v. *Manchester Corpn.*, 1908, A. C. 117; *L. & N. W. Ry. Co.* v. *Howley, &c. Co.*, 1911, 2 Ch. 97, 110, 119, 130; affirmed, 1913, A. C. 11; Gale on Easements, 216, 4th ed. (343, 9th ed.).

(*a*) *Wyatt* v. *Harrison*, 3 B. & Ad. 871; *Partridge* v. *Scott*, 3 M. & W. 220; Gale on Easements, 218, 4th ed. (357, 9th ed.).

(*b*) See cases cited in note (*d*), below.

(*c*) *Dalton* v. *Angus*, 6 App. Cas. 740.

(*d*) *North Eastern Ry. Co.* v. *Elliot*, 1 J. & H. 145, 153; affirmed, 2 De G., F. & J. 423; sub nom. *Elliot* v. *North Eastern Ry. Co.*, 10

Support of buildings by buildings on adjoining land.

Party walls.

It appears that the right of support of some building by another building erected on adjoining land and not belonging to the owner of the building so supported is an easement to be acquired by grant or prescription (*e*). The common user, for the purposes of support, of a wall separating the houses or buildings of two different owners is evidence *primâ facie* that the wall and the land on which it is erected belongs to them as tenants in common in equal shares (*f*). But this presumption may be rebutted by evidence that the wall was actually built half on one owner's land and half on the other's at their joint expense, or entirely on one owner's land or otherwise; and in such case the ownership of the wall and the rights of support thereby will be according to the facts proved (*g*). The term "party wall" may be applied in any of such cases, but its primary meaning appears to be that of a dividing wall held in common (*h*). In the metropolis the rights of landowners, whose properties are divided by a party wall, are regulated by the London Building Act, 1894 (*i*).

Boundary hedges and ditches.

Where the lands of two different owners are separated by a ditch and a bank or hedge, it is presumed, in the absence of evidence to the contrary, that the bank or hedge and also the soil of the ditch belong to the owner of the land on the side where the ditch is not: but no such presumption arises where there is a ditch on both sides of a hedge (*k*).

H. L. C. 333, 356, 362; *Siddons* v. *Short*, 2 C. P. D. 572; *Dalton* v. *Angus*, 6 App. Cas. 740, 792, 826; *Rigby* v. *Bennett*, 21 Ch. D. 559; *Grosvenor Hotel Co.* v. *Hamilton*, 1894, 2 Q. B. 836, 841, 842.

(*e*) *Lemaitre* v. *Davis*, 19 Ch. D. 281; *Tone* v. *Preston*, 24 Ch. D. 739, 742; *Selby* v. *Whitbread*, 1917, 1 K. B. 736, 751; and see *Union Lighterage Co.* v. *London Graving Dock Co.*, 1902, 2 Ch. 557.

(*f*) *Cubitt* v. *Porter*, 8 B. & C. 257; and see *Watson* v. *Gray*, 14 Ch. D. 192; *Mayfair Property Co.* v. *Johnston*, 1894, 1 Ch. 508. At common law, either owner has the right to repair such a party wall; *Colebeck* v. *Girdlers' Co.*, 1 Q. B. D. 234, 243.

(*g*) *Matts* v. *Hawkins*, 5 Taunt. 20; and see *Watson* v. *Gray*, 14 Ch. D. 192, 195; *Jones* v. *Pritchard*, 1908, 1 Ch. 630; *Mason* v. *Fulham Corpn.*, 1910, 1 K. B. 631, 637.

(*h*) See *Watson* v. *Gray*, ubi sup.

(*i*) Stat. 57 & 58 Vict. c. ccxiii.; see *Drury* v. *Army and Navy, &c. Supply*, 1896, 2 Q. B. 271; *Hobbs* v. *Grover*, 1899, 1 Ch. 11; *Re Stone and Hastie*, 1903, 2 K. B. 463; *Carlish* v. *Salt*, 1906, 1 Ch. 335 (as to which see above, p. 165 and n. (*b*)); *Lewis* v. *Charing Cross, &c. Ry.*, ib. 509; *Crosby* v. *Alhambra Co., Ltd.*, 1907, 1 Ch. 295; *Mason* v. *Fulham Corpn.*, 1910, 1 K. B. 631; *London, &c. Dairy Co.* v. *Morley*, 1911, 2 K. B. 257; *Barry* v. *Minturn*, 1913, A. C. 584; *Selby* v. *Whitbread*, 1917, 1 K. B. 736.

(*k*) Bayley, J., *Guy* v. *West*, 2 Sel. N. P. 1244, 13th ed.; Laurence,

Undivided share in land.

If an undivided share in land be sold, which is held under a tenancy in common created less than forty years before the sale, the title to be shown, in the absence of special stipulation, is the title to the entirety from a date forty years at least before the contract down to the creation of the tenancy in common, and thenceforward the title to the share sold only (*l*). But where the share sold has been held as an undivided share for more than forty years, only forty years' title to the share, as such, can be required. Of course in either case the abstract must commence with a good root of title (*m*). If one tenant in common buy the share of another, and stipulate generally for the delivery of an abstract of title or stipulate expressly that a good title shall be shown, he is entitled to production of the same title as if he were a stranger (*n*). But if he make no such stipulation, and the tenancy in common were created less than forty years before the sale, it appears that he can only demand production of the title to the share sold since the creation of the tenancy in common (*o*). The vendor of an undivided share in land must of course be careful to describe it as such and to state accurately the proportion to which he is entitled; as if he should purport to sell the entirety or a larger share than he has (*p*), the purchaser would be entitled at his option either to reject the title altogether (*q*), or to take what the vendor could convey and demand compensation for the deficiency (*r*).

Tenant in common buying other shares.

Title under trust for conversion.

Whenever a vendor claims to have become entitled to some property as realty or personalty under a trust for conversion of money into land, or *vice versâ* (*s*), the purchaser's advisers should be careful to ascertain that there is or has been an

J., *Vowles* v. *Mellor*, 3 Taunt. 137, 138; Holroyd, J., *Doe* v. *Pearsey*, 7 B. & C. 304, 307, 308; *Marshall* v. *Taylor*, 1895, 1 Ch. 641, 644, 647, 649; *Craven* v. *Pridmore*, 18 Times L. R. 282; *Henniker* v. *Howard*, 90 L. T. 157; *Collins* v. *Amphlett*, 1918, 1 Ch. 232, 245, 253, 259.

(*l*) Sug. V. & P. 377.

(*m*) Above, pp. 98-101, 179, 192-194.

(*n*) *Morris* v. *Kearsley*, 2 Y. & C. 139; Sug. V. & P. 377, 428.

(*o*) *Law* v. *Law*, 9 Jur. 745; *Phipps* v. *Child*, 3 Drew. 709; *Brooke* v. *Garrod*, 2 De G. & J. 62, 68; Dart, V. & P. 286, 5th ed.; 326, 6th ed.; 322, 7th ed.; but see Sug. V. & P. 377, 428.

(*p*) *Roffey* v. *Shallcross*, 4 Madd. 227.

(*q*) *Re Arnold*, 14 Ch. D. 270; see above, pp. 33, 41, 42, 153.

(*r*) *Hooper* v. *Smart*, L. R. 18 Eq. 683; *Horrocks* v. *Rigby*, 9 Ch. D. 180; see above, pp. 41, 42; below, Chap. XII. § 4.

(*s*) See Wms. Real Prop. 196, 197, 23rd ed.; Wms. Pers. Prop. 418-420, 447, 17th ed.

effective trust for conversion as alleged. And it must be borne in mind that, except in the two cases of a term of years attendant upon the inheritance (*t*) and capital money actually arising under the Settled Land Acts (*u*), personalty can only acquire in equity the character and incidents of realty by means of an imperative trust for investment in the purchase of real estate (*x*). Thus it has been held that a direction, that money shall be held and applied upon the same trusts and in the same manner as if it were capital money arising under the Settled Land Acts from the sale of certain freehold lands limited in strict settlement, is insufficient to invest the money with the quality of real estate in equity; and in such case the absolute property in the money will vest, as personalty, in the person entitled to the first estate tail under the settlement (*y*). So also, where a purchaser of lands keeps on foot for his own benefit a mortgage affecting it, he remains entitled to the mortgage as his personal property (*z*). Similarly, in order to invest land in equity with the character of personalty, there must be an imperative trust for sale. Where land is given to trustees on trust for certain persons, with a mere power of sale at the trustees' discretion, and a direction that the beneficiaries shall at once be entitled to their respective interests as personalty (a mode of disposition by no means infrequent in ill-drawn wills), the direction is entirely ineffective, and until actual sale the beneficiaries take the property as realty (*a*).

§ 6.—*Sale of purely incorporeal hereditaments.*

Sale of purely incorporeal hereditaments.

Upon the purchase of purely incorporeal hereditaments, the general rule as to the title required to be shown is the same as upon the purchase of land, that is to say, if the incorporeal hereditament be sold in fee and under an open contract, forty

(*t*) Wms. Real Prop. 420, 13th ed.; 592, 23rd ed.
(*u*) Stat. 45 & 46 Vict. c. 38, s. 22 (5, 6).
(*x*) *Re Walker,* 1908, 2 Ch. 705, 712; *Re Gibbon,* 1909, 1 Ch. 367, 378; *Re Aspinall's Settled Estates,* 1916, 1 Ch. 15, 20; *Re Sturt,* 1922, 1 Ch. 416, 421. A trust for conversion may be impliedly, as well as expressly, declared: *Johnson* v. *Arnold,* 1 Ves. sen. 169; 1 Jarm. Wills, 745, 749 *sq.,* 6th ed.
(*y*) *Re Walker,* 1908, 2 Ch. 705; and see above, pp. 357, 358 and n. (*s*).
(*z*) *Re Gibbon,* 1909, 1 Ch. 367.
(*a*) See authorities cited in note (*x*), above; *A.-G.* v. *Mangles,* 5 M. & W. 120; *A.-G.* v. *Simcox,* 1 Ex. 749; *Adv.-Gen.* v. *Smith,* 1 Macq. 760; *Edwards* v. *Tuck,* 23 Beav. 268; *Hyett* v. *Makin,* 25 Ch. D. 735, 738, 739. Cf. *Watson* v. *Black,* 16 Q. B. D. 270.

years' title, commencing with a good root of title, must be shown (*b*). This applies equally to the sale of a seigniory, a rent-charge, a *profit à prendre*, a franchise, or an easement. The exceptions are those already noted (*c*) of the sale of tithes or other property held under a grant from the Crown, and of an advowson. Upon a contract to grant in fee a new incorporeal hereditament to be exercisable over or issue out of the grantor's land, such as a right of way or a rent-charge, the same title must be shown to all the land, which will be subject to the grant, as upon a sale thereof (*d*).

Contract to grant an incorporeal hereditament *de novo*.

Rent-charge.

On the sale of a rent-charge in fee, besides the documentary title, evidence must be given that the vendor is in actual receipt of the rent sold, as in the case of a sale of ground rent (*e*). This is the more necessary on the sale of a rent-charge, in that such a rent may be barred and extinguished after twelve years' non-payment under the Statute of Limitations (*f*). The purchaser should inquire of the terre-tenant whether he pays the rent in question to the vendor (*g*). Purchasers of perpetual rents, whether rents service, rents-charge or rents seck, should not forget that a rent in fee, not being a tithe rent-charge or a rent reserved on a sale or lease or made payable under a grant or licence for building purposes, is redeemable on the requisition of any person interested in the land, out of which the rent issues, at an amount of money to be certified, formerly, by the Board of Agriculture (*h*), afterwards styled the Board of Agriculture and Fisheries, and now by the Ministry of Agriculture and Fisheries (*i*). With regard to the remedies to which a purchaser of a rent in fee will become entitled, rents seck

Perpetual rents, when redeemable.

Remedies of owners of rents.

(*b*) See above, pp. 91 and n. (*u*), 94, 98, 99; *Re Earnshaw Wall*, 1894, 3 Ch. 156, 158.

(*c*) Above, pp. 90, 91, 94.

(*d*) *Beddington* v. *Atlee*, 35 Ch. D. 317, 329, 331; *Re Stewart*, 41 Ch. D. 494, 506. The principle of this is the same which was applied in deciding that one, who contracted to grant a lease for years, was bound to show a good title to the freehold of the lands to be leased; above, p. 90, n. (*m*); *Fildes* v. *Hooker*, 2 Mer. 424.

(*e*) Above, p. 381.

(*f*) See *James* v. *Salter*, 3 Bing. N. C. 544; *Grant* v. *Ellis*, 9 M. & W. 113; *De Beauvoir* v. *Owen*, 5 Ex. 166; *Dean of Ely* v. *Bliss*, 2 De G., M. & G. 459, 472; *Irish Land Commrs.* v. *Grant*, 10 App. Cas. 14, 26, 27; *Howitt* v. *Harrington*, 1893, 2 Ch. 497, 504, 507; *Shaw* v. *Crompton*, 1910, 2 K. B. 370, 376.

(*g*) See above, p. 382.

(*h*) Stats. 44 & 45 Vict. c. 41, s. 45; 52 & 53 Vict. c. 30, s. 2.

(*i*) See above, p. 134, n. (*b*).

are of course now recoverable by distress equally with rents-charge (*j*); owners of rents have, since the abolition of real actions, been allowed a remedy by suing the terre-tenant personally (*k*); and they may apply to a Court of Equity to order any arrears of the rent to be raised by sale or mortgage of the land, out of which it issues, the granting of such relief being discretionary (*l*). Where the rent sold is a rent-charge in fee created on a grant of land for building purposes in consideration of a rent-charge, it will of course be borne in mind that any covenant contained in the deed of grant that the grantee, his heirs and assigns will pay the rent or build on the land is only a personal covenant and will not run with the land, either at law or in equity, so as to be enforceable against the grantee's assigns (*m*). Where on such a grant the rent-charge and the grantee's estate have been limited by way of use to be executed by the Statute of Uses (*n*), and there has been a proviso allowing the grantor, his heirs or assigns, on non-payment of the rent or breach of covenant to re-enter and hold the land charged in fee, it appears, according to modern doctrine (*o*), that the right of re-entry is void, at least as regards the grantor's heirs and assigns, unless it were so limited that it must necessarily arise within the period allowed by the rule against perpetuities. But a power given on such a grant of a rent-charge in fee for the grantee, his heirs or assigns, to enter on the land charged, in case of non-payment of the rent, and hold the land until all arrears of the rent and all expenses shall have been discharged, appears to stand upon a different footing. Such a power was regarded as remedial only and as being part of the estate which the grantee has in the rent; and whether the power were conferred in express words or by virtue of the 44th section of the

Covenant to pay a rent-charge.

Proviso for re-entry on non-payment of rent-charge.

(*j*) Stat. 4 Geo. II. c. 28, s. 5; Wms. Real Prop. 466, 467, 23rd ed.

(*k*) *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Christie* v. *Barker*, 53 L. J. Q. B. 537; *Re Blackburn, &c. Building Society, Ex parte Graham*, 42 Ch. D. 343; *Searle* v. *Cooke*, 43 Ch. D. 519; *Pertwee* v. *Townsend*, 1896, 2 Q. B. 129; *Re Herbage Rents*, 1896, 2 Ch. 811; *Foley's Charity Trustees* v. *Dudley Corpn.*, 1910, 1 K. B. 317; *Cunliff* v. *Fitzsimmons*, 1911, 1 K. B. 513. The decision in *Thomas* v. *Sylvester* is criticised by the author in L. Q. R. xiii. 288.

(*l*) *Hambro* v. *Hambro*, 1894, 2 Ch. 564.

(*m*) *Haywood* v. *Brunswick, &c. Building Society*, 8 Q. B. D. 403; *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750.

(*n*) Stat. 27 Hen. VIII. c. 10.

(*o*) *Dunn* v. *Flood*, 25 Ch. D. 629, 28 Ch. D. 586, 592; *Re Hollis's Hospital and Hague's Contract*, 1899, 2 Ch. 540, 554; Gray, Rule against Perpetuities, § 303. See below, Chap. XII. Sect. 3.

Conveyancing Act, 1881 (*p*), there appears to be no good reason for supposing that the same was invalid, if not limited to arise within the period allowed by the rule against perpetuities (*q*). It seems, however, that some lawyers entertained doubts upon this subject. For by the Conveyancing Act, 1911 (*r*), it was declared, for removing doubts, that the rule of law relating to perpetuities does not apply to any powers or remedies conferred by sect. 44 of the Act of 1881, or to the same or the like powers conferred by any instrument for recovering or compelling the payment of any annual sum within the meaning of that section.

Release of part of land subject to a rent-charge.

Here the reader may be reminded that, before the 13th of August, 1859, a release by the owner of a rent-charge of part of the lands, out of which the rent issued, had the effect of entirely extinguishing the rent-charge (*s*). Since then, if such a release be made, the right only to recover any part of the rent-charge out of the lands released is barred; and the lands not included in the release remain liable, not to the whole rent-charge, but only to a part thereof proportionate to their value (*t*). But if the owner of the lands not released concur in the release, his lands remain liable to the entire rent-charge (*u*). It appears, however, that this alteration of the law does not extend to a rent seck, which seems to remain on the same footing, in respect of apportionment, as a rent-charge stood at common law (*x*).

Release of part of land subject to a rent-seck.

Registration of a rent-charge, where necessary.

No registration is required to perfect in any way the grant of a rent in fee or in tail. But an annuity or rent-charge granted, otherwise than by marriage settlement or will, for a

(*p*) Stat. 44 & 45 Vict. c. 41.

(*q*) *Havergill* v. *Hare*, Cro. Jac. 510; Sugd. Gilb. Uses, 178, 179; Lewis on Perpetuities, 618; Davidson, Prec. Conv. vol. ii. part i. 508, 511, and notes, 4th ed.; Gray, Rule against Perpetuities, § 303. See below, Chap. XII. Sect. 3.

(*r*) Stat. 1 & 2 Geo. V. c. 37, s. 6 (1), applying to powers and remedies conferred by or implied in an instrument executed before as well as after the commencement of that Act; sect. 6 (3).

(*s*) Litt. ss. 222, 224; *Dennett* v. *Pass*, 1 Bing. N. C. 388; Wms. Real Prop. 476, 477, 23rd ed.

(*t*) Stat. 22 & 23 Vict. c. 35, s. 10; *Booth* v. *Smith*, 14 Q. B. D. 318.

(*u*) *Price* v. *St. John*, 1905, 1 Ch. 744.

(*x*) See Litt. ss. 217-227; Co. Litt. 147 b, 150 b; Gilb. Tenures, 402 and n. lvii., 4th ed. All rent service payable in money, whether incident to a seigniory or reserved on a lease for years, is apportionable at common law; Litt. ss. 222, 223; Co. Litt. 148 a, 149 b.

life or lives or for any estate determinable on a life or lives, must be registered in the Office of Land Registry against the name of the person, whose estate is intended to be affected, otherwise the same will not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors (*y*). Purchasers, however, who take with notice of such annuities or rent-charges, are bound by them in equity, although they be not registered (*z*). Rent-charges coming within the definition of a land charge contained in the Land Charges Act, 1888, and created after that year, must be duly registered at the Office of Land Registry, or they will be void as against a purchaser for value of the land charged, or any interest therein (*a*). And similar rent-charges previously created but assigned by act *inter vivos* after that year must be duly registered at the Office of Land Registry. For the same Act further provides that, after the expiration of one year from the first assignment made by act *inter vivos* after the year 1888 of a similar rent-charge previously created, the person entitled thereto shall not be able to recover the same as against a purchaser for value of the land charged, or any interest therein, unless the charge be so registered before the completion of the purchase (*b*). The rent-charges, to which these provisions apply, are mainly those

(*y*) Stat. 18 & 19 Vict. c. 15, ss. 12, 14, passed 26th April, 1855, and applying to annuities or rent-charges granted after the passing of the Act. The registration was formerly required to be made in the Court of Common Pleas, and afterwards in the Central Office of the Supreme Court; see stat. 42 & 43 Vict. c. 78; R. S. C. 1883, Ord. LXI.; stat. 63 & 64 Vict. c. 26, s. 1, and Order thereunder, W. N. 18th Aug. 1900.

(*z*) *Greaves* v. *Tofield*, 14 Ch. D. 563.

(*a*) Stat. 51 & 52 Vict. c. 51, s. 12. By sect. 4, "land charge" means a rent, or annuity or principal moneys payable by instalments, or otherwise, with or without interest, charged otherwise than by deed upon land under the provisions of any Act of Parliament for securing to any person either the moneys spent by him, or the costs, charges and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the 35th section of the Land Drainage Act, 1861, but does not include a rate or scot. It also included a charge made under sect. 29 of the Agricultural Holdings Act of 1883, and was extended to a charge under sect. 31 of that Act by stat. 53 & 54 Vict. c. 57, s. 3; all now replaced by the Agricultural Holdings Act, 1908 (8 Edw. VII. c. 28), ss. 15, 19, 35.

(*b*) Stat. 51 & 52 Vict. c. 51, s. 13. By sect. 4, in this Act "purchaser for value" includes a mortgagee or lessee or other person who for valuable consideration takes any interest in land or a charge on land.

created under the Improvement of Land Act, 1864 (*c*), or other Land Improvement Acts (*d*). By the Improvement of Land Act, 1899 (*e*), rent-charges created either before or after that Act under the Improvement of Land Act, 1864, or any special Improvement Act, shall be recoverable, as regards any instalment accruing due after the year 1899, by the like remedies as are provided by the Conveyancing Act, 1881, in respect of rent-charges thereafter created, *and not otherwise*. This appears to preclude the owners of such rent-charges from recovering such arrears by personal action against the terre-tenant under the doctrine laid down in *Thomas* v. *Sylvester* (*f*). When a rent-charge sold is of such a kind that it requires registration, the conveyancer advising the purchaser should of course inquire whether the necessary registration was duly made. If not, he should object to the title, unless the defect should be removable by subsequent registration, as it might be if, since the grant of the rent-charge, there had been no dealing for value with the land charged.

Tithe rent-charge.

An impropriate tithe rent-charge, being of course a rent-charge in commutation of tithes (*g*), is subject to the rules already mentioned as to proof of title on the sales of tithes (*h*).

Lands sold as tithe-free.

And when lands are sold as tithe-free owing to the merger of the tithe rent-charge therein (*i*), the title to the tithes prior to the merger must be shown in the absence of stipulation to the contrary. If the tithes should have been merged more than forty years before the sale, the grant of the tithes from the Crown and, apparently, the instrument of merger must still be produced (*k*). If lands be sold as tithe-free, and the exemp-

(*c*) Stat. 27 & 28 Vict. c. 114.
(*d*) See Wms. Real Prop. 132, 23rd ed.
(*e*) Stat. 62 & 63 Vict. c. 46, s. 3.
(*f*) Above, p. 417, n. (*k*).
(*g*) Wms. Real Prop. 487, 23rd ed. (*h*) Above, p. 94.
(*i*) A tithe rent-charge can only be merged by the execution of some instrument under stats. 6 & 7 Will. IV. c. 71, s. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62, s. 1; 9 & 10 Vict. c. 73, ss. 18, 19. It does not merge by the mere fact of the union in the same person of the estate in the land and in the tithes: Shelford on Tithes, 292, n., 3rd ed.
(*k*) Sug. V. & P. 367; 1 Dart, V. & P. 295, 5th ed.; 336, 6th ed.; 331, 7th ed. But any instrument purporting to merge any tithes or rent-charge, and executed with the consent of the Tithe Commissioners before the passing of stat. 9 & 10 Vict. c. 73, s. 19 (26th August, 1846), is valid and effectual to merge the tithes, although the person purporting to merge the tithes had no estate therein: *Walker* v. *Bentley*, 9 Hare, 629. The production of such an instrument appears, therefore, to be sufficient proof of the merger of the tithe.

tion be alleged to arise from other cause than merger (*l*), the facts giving rise to the exemption must be strictly proved (*m*). And if land sold as tithe-free should not be free from tithe, the purchaser will not be compelled to take the title (*n*).

Advowson.

The length of title which must be shown on a sale of an advowson under an open contract has been already noticed (*o*). On the sale of an advowson, the abstract of title should be accompanied with or comprise a list of the presentations made during the time for which title has to be deduced, so as to show that enjoyment has gone along with the title (*p*). The purchaser should verify this list of presentations by examination of the bishop's institution book or diocesan register of institutions, the entry in which is, next to the presentation itself (if in writing), good evidence of the presentation (*q*). The law relating to the sales of advowsons is now regulated by the Benefices Act, 1898 (*r*). Prior to that Act, an advowson was as freely saleable and transferable as any other real property, subject only to the laws by which any presentation made to an ecclesiastical benefice in consideration of any profit or benefit was void as simoniacal (*s*). With respect to this, the following distinctions were established:—It was not simoniacal for any person, whether layman or clerk, to purchase an advowson, either in fee or for any less estate, while the church was full; and the conveyance on such a purchase would carry with it the right of next presentation, however immediate were the prospect of a vacancy at the time of sale, provided that the vacancy were not occasioned by some agreement or arrange-

(*l*) See Burton's Compendium, ch. 6, sect. 4; stats. 2 & 3 Will. IV. c. 100; 4 & 5 Will. IV. c. 83; *Salkeld* v. *Johnston*, 1 Mac. & G. 242.

(*m*) Dart, V. & P. 354-356, 1075, n. (*k*), 5th ed.; 401, 402, 1201, n. (*q*), 6th ed.; 396, 397, 7th ed.; above, p. 164, and n. (*q*).

(*n*) *Ker* v. *Clobury*, Sug. V. & P. 321; *Binks* v. *Rokeby*, 2 Swanst. 222.

(*o*) Above, p. 94.

(*p*) Sug. V. & P. 367; 1 Dart, V. & P. 293, 5th ed.; 334, 6th ed.; 329, 7th ed.; 1 Davidson, Prec. Conv. 527, 4th ed.; 439, 5th ed.

(*q*) See *Tillard* v. *Shebbeare*, 2 Wils. K. B. 366. The register appears to be such a public document as is admissible in evidence on mere production from its proper custody: 1 Phillimore, Eccl. Law, 354, 355, 2nd ed.; *R.* v. *Bishop of Ely*, 8 B. & C. 112; see above, p. 113.

(*r*) Stat. 61 & 62 Vict. c. 48.

(*s*) *Barret* v. *Glubb*, 2 W. Bl. 1052; *Fox* v. *Chester*, 3 Bli. N. S. 123; *Exeter* v. *Marshall*, L. R. 3 H. L. 17, 45, 52; *Walsh* v. *Lincoln*, L. R. 10 C. P. 518; see Bac. Abr. Simony.

ment between the parties (*t*). And if a clerk so purchased an estate in fee or for life in an advowson, he might present himself to the living (*u*). But any agreement or arrangement between the parties to the sale of an advowson for causing the living to become vacant was simoniacal; and a presentation made upon any vacancy so caused was void, and the right of presentation for the next turn became forfeited to the Crown (*x*). A sale of an advowson made while the church was vacant did not carry with it the right of next presentation (*y*), but was in other respects perfectly valid and passed the right of presentation for all subsequent turns. And if an advowson were sold and conveyed while the church was full and at the same time a simoniacal arrangement were made for causing a vacancy, the next presentation only was forfeited to the Crown, and the conveyance was otherwise good and passed the right of presentation for the succeeding turns (*z*). And the sale of the right of next presentation only was valid if made while the church was full (*a*), though not if it were vacant; but a clerk was prohibited from purchasing a next presentation in order to present himself to the living (*b*).

Benefices Act, 1898.

By the Benefices Act, 1898 (*c*), a transfer of a right of patronage of a benefice shall not be valid unless (1) it is registered in the prescribed manner (*d*) in the registry of the diocese within one month from the date of the transfer, or within such extended time as under special circumstances the bishop may think fit to allow; (2) it transfers the whole interest of the transferor in the right except as thereinafter provided; and (3) more than twelve months have elapsed since the last institution or admission to the benefice. The expression *transfer* here includes any conveyance or assurance passing or creating any legal or equitable interest *inter vivos*, and any agreement for such conveyance or assurance; but does not include a transfer

(*t*) See preceding note.
(*u*) See *Walsh* v. *Lincoln*, L. R. 10 C. P. 518; *Lowe* v. *Chester*, 10 Q. B. D. 407.
(*x*) Stat. 31 Eliz. c. 6, s. 5; Abbott, C. J., *Fox* v. *Chester*, 2 B. & C. 635, 660; Cripps' Laws of the Church, 466, 7th ed.
(*y*) *Alston* v. *Atlay*, 7 A. & E. 289.
(*z*) *Greenwood* v. *London*, 5 Taunt. 727.
(*a*) *Fox* v. *Chester*, 3 Bli. N. S. 123.
(*b*) Stat. 12 Anne, st. 2, c. 12, s. 2.
(*c*) Stat. 61 & 62 Vict. c. 48, s. 1 (1).
(*d*) See Benefices Rules, 1898, W. N. 7th Jan. 1899.

on marriage, death, or bankruptcy, or otherwise by operation of law, or a transfer on the appointment of a new trustee where no beneficial interest passes (*e*). And nothing in this enactment shall prevent the reservation or limitation in a family settlement of a life interest to the settlor, or in a mortgage the reservation of a right of redemption (*f*). The Act also invalidates (*g*) any agreement for any exercise of a right of patronage of a benefice in favour or on the nomination of any particular person, and any agreement on the transfer of a right of patronage of a benefice for the resignation of a benefice in favour of any person. Any conveyance either of an advowson or a next presentation must now conform with the requirements of this Act or it will be invalid. Thus it appears that the conveyance of an advowson by way of family settlement must be registered and must in other respects conform with the provisions of the Act: whilst a conveyance of an advowson by way of marriage settlement remains exempt from the requirements of the Act as to transfer, including the necessity of registration. And it seems that these rules apply equally to the transfer of an advowson appendant or in gross. The second requirement imposed by the Act appears to invalidate sales or grants by the owners of an advowson (*h*) of the next presentation or any less estate or interest than the whole fee simple in the advowson; except only by way of reservation or limitation in a family settlement of a life interest to the settlor, or of reservation in a mortgage of an equity of redemption. And it is to be noted that, even in a family settlement, only the limitation of a life interest to the settlor is allowed; so that the limitation in such a settlement of an advowson by a settlor entitled in fee simple to the use of himself in tail or for any term of years appears to be invalid. If, however, the grantor transfer the whole of his own estate in the advowson by way of family settlement, the limitation of estates for years, for life, or in tail, with an ultimate remainder in fee simple to other persons than him-

(*e*) Sect. 1 (6). (*f*) Sect. 1 (7).

(*g*) Sect. 1 (3). By sect. 2 (1a), a bishop may refuse to institute or admit a presentee to a benefice if at the date of the vacancy not more than one year has elapsed since a transfer as defined by the first section of this Act of the right of patronage of the benefice, unless it be proved that the transfer was not effected in view of the probability of a vacancy within such year.

(*h*) The right of next presentation obviously remains transferable where it constitutes the whole interest of the transferor.

self, does not appear to offend against the statute. But where the ultimate remainder in fee simple is limited to the use of the grantor, the Act seems to be infringed and the transfer to be invalid. And this seems to be the case where a life interest is reserved to the grantor, with intermediate limitations to others and an ultimate remainder in fee to himself. The Act also provides (*i*) that it shall not be lawful to offer for sale by public auction any right of patronage, except in the case of an advowson to be sold in conjunction with any manor, or with an estate in land of not less than one hundred acres situate in the parish in which the advowson is situate, or in an adjoining parish and belonging to the same owner as the advowson.

Prohibition as to sales of advowsons by auction.

Upon the sale of an advowson when the church is full, the legal right to present on the next vacancy remains with the vendor until the sale be completed by conveyance (*k*); but in equity the right of presentation belongs to the purchaser as from the date of the contract for sale, subject to the condition of his accepting the title. If, therefore, a vacancy occur before completion, the purchaser, having first accepted the title, may require the vendor to present to the living such person as the purchaser may select (*l*). But if the living became vacant by the promotion of the incumbent to the bishopric of a see in England, the Crown is entitled to present for that turn (*m*).

Right of presentation pending completion of sale of an advowson.

When an advowson or a next presentation was sold in expectation of an early avoidance of the living, various devices were resorted to in order to protect the purchaser in case the expected avoidance did not take place. Thus it was sometimes provided in the contract for sale that the purchase money should on completion be deposited with trustees to be paid over to the vendor if the vacancy occurred within a specified time, but otherwise to be returned to the purchaser and the advowson to be recon-

Devices formerly used on sale in expectation of a vacancy.

(*i*) Sect. 1 (2), whereby also any person offering any right of patronage for sale by auction in contravention thereof, or bidding at any such sale, is rendered liable on summary conviction to a fine not exceeding 100*l*.

(*k*) 17 Vin. Abr. Presentation, 319, pl. 11.

(*l*) *Fox* v. *Chester*, 3 Bli. N. S. 123, 155-157; *Nicholson* v. *Knapp*, 9 Sim. 326; *Dowling* v. *Maguire*, Ll. & G. t. Plunk. 1, 30; *Greenslade* v. *Dare*, 17 Beav. 502.

(*m*) *Grocers' Co.* v. *Archbp. of Canterbury*, 3 Wils. K. B. 214, 232, 233; *R.* v. *Eton College*, 8 E. & B. 610.

veyed to the vendor (*n*). Or it was stipulated that the *vendor* should pay interest on the purchase money from the date fixed for completion until the benefice should become vacant (*o*); and such a stipulation was held not to be void as simoniacal on the sale of an advowson, where the vendor was not the incumbent (*p*). Or it was agreed that the vendor should re-purchase the advowson, if the living were not avoided within a certain time. But now, by the Benefices Act, 1898 (*q*), any agreement on the transfer of a right of patronage of a benefice either (i) for re-transfer of the right, or (ii) for postponing payment of any part of the consideration for the transfer until a vacancy or for more than three months, or (iii) for payment of interest until a vacancy or for more than three months, or (iv) for any payment in respect of the date at which a vacancy occurs, shall be invalid.

§ 7.—*Sale of Charity Lands.*

Charity lands.

On the sale of any hereditaments which are or have been subject to any charitable uses or trusts (*r*), there are two main points to be considered by the conveyancer advising on the title: first, whether the hereditaments were duly assured in accordance with Part II. of the Mortmain and Charitable Uses Act, 1888 (*s*), or the statutes now replaced by that enactment (*t*), to the charitable uses on which it is alleged that they are or were held; and secondly, whether any conveyance of such hereditaments agreed by the contract of sale to be made, or purported to be made by any of the documents of title, is or was subject to the restrictions imposed by the 29th section of the Charitable Trusts Amendment Act, 1855 (*u*), and if so, whether the conditions thereby imposed have been complied with. The first of these requirements must also be observed on the purchase of

(*n*) Davidson, Prec. Conv. vol. ii. part i. 30, 35, 4th ed.
(*o*) Davidson, Prec. Conv. vol. ii. part i. 37, 41, 4th ed.; 1 Key & Elphinstone, Prec. Conv. 632, n., 4th ed.
(*p*) *Sweet* v. *Meredith*, 3 Giff. 610, 8 Jur. N. S. 637.
(*q*) Stat. 61 & 62 Vict. c. 48, s. 1 (3).
(*r*) As to what uses or trusts are charitable, see *Income Tax Commrs.* v. *Pemsel*, 1891, A. C. 531, 583; *Hunter* v. *A.-G.*, 1899, A. C. 309; Tudor's Charitable Trusts, Chap. I.; 1 Jarm. Wills, 212 *sq.*, 6th ed.
(*s*) Stat. 51 & 52 Vict. c. 42, amended by 54 & 55 Vict. c. 73.
(*t*) Stats. 9 Geo. II. c. 36 (commonly called the Mortmain Act); 9 Geo. IV. c. 85; 24 & 25 Vict. c. 9; 25 & 26 Vict. c. 17; 27 & 28 Vict. c. 13; 29 & 30 Vict. c. 57; 31 & 32 Vict. c. 44; 34 & 35 Vict. c. 13; 35 & 36 Vict. c. 24.
(*u*) Stat. 18 & 19 Vict. c. 124.

any hereditaments to be assured to any charitable uses. Besides which, if the title should comprise a conveyance to a *corporation* for charitable purposes, it must be ascertained that the same was made in conformity with the law of conveyance to a corporation into mortmain, now contained in Part I. of the Mortmain and Charitable Uses Act, 1888.

Requisites of the conveyance of land to charitable uses.

By Part II. of the Mortmain and Charitable Uses Act, 1888 (*x*), subject to the savings and exceptions in the Act contained, and to the amendments now made (*y*) as stated below with respect to assurances by will, every assurance (*z*) of land to or for the benefit of any charitable uses shall be made in accordance with the requirements of this Act, and unless so made shall be void (*a*). These requirements are that the assurance must be made—(1) by deed (2) executed in the presence of at least two witnesses (3) twelve months at least before the assuror's death (*b*) and (4) enrolled in the Central Office of the Supreme Court within six months after the execution thereof; and (5) must be made to take effect in possession for the charitable use intended immediately from the making thereof, and (6) must, except as in the Act provided (*c*), be

(*x*) Stat. 51 & 52 Vict. c. 42, s. 4.

(*y*) By stat. 54 & 55 Vict. c. 73; see p. 433, below.

Assurance.

(*z*) By stat. 51 & 52 Vict. c. 42, s. 10, in this Act, unless the context otherwise requires, "assurance" includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, *and every other assurance* by deed, will or other instrument; and "assure" and "assuror" have meanings corresponding with assurance. Independently of statute, any transaction which operates to transfer the property in lands or goods and any document evidencing such a transaction is an assurance; see Shep. Touch. 1; 2 Black. Comm. 294; *Re Roberts*, 36 Ch. D. 196; *Re Ray*, 1896, 1 Ch. 468, 476. Cf. above, p. 364, n. (*b*).

(*a*) See *Churcher* v. *Martin*, 42 Ch. D. 312.

(*b*) Including in those twelve months the days of the making of the assurance and of the death.

(*c*) By stat. 51 & 52 Vict. c. 42, s. 4 (4), the assurance, or any instrument forming part of the same transaction, may contain all or any of the following provisions; so, however, that they reserve the same benefits to persons claiming under the assuror as to the assuror himself, namely—

(i.) The grant or reservation of a peppercorn or other nominal rent;
(ii.) The grant or reservation of mines or minerals;
(iii.) The grant or reservation of any easement;
(iv.) Covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, and covenants or provisions of the like nature for the use and enjoyment as well of the land

without any power of revocation, reservation, condition or provision for the benefit of the assuror or any person claiming under him. The first and second of these requirements do not apply to assurances of land of copyhold or customary tenure (*d*). The third requirement, whereby any assurance of land to any charitable uses may become void by reason of the assuror's death within a year after the execution thereof, is not imposed on assurances of land made in good faith for full and valuable consideration; and this is equally the case whether such consideration be actually paid upon or before the making of the assurance, or be reserved or made payable to the vendor or any other person by way of rent, rent-charge or other annual payment in perpetuity, or for any term of years or other period, with or without a right of re-entry for non-payment thereof, or partly paid and partly reserved as aforesaid (*e*). Any assurance of land, which is by the Act required to be made by deed, may be made by a registered disposition under the provisions of the Land Transfer Acts, 1875 and 1897, and if so made shall be exempt from the requirements of the Act of 1888 as to

Assurance by registered disposition under the Land Transfer Acts.

comprised in the assurance as of any other adjacent or neighbouring land;

(v.) A right of entry on non-payment of any such rent or on breach of any such covenant or provision;

(vi.) Any stipulations of the like nature for the benefit of the assuror, or any person claiming under him.

By sect. 4 (5), if the assurance is made in good faith on a sale for full and valuable consideration, that consideration may consist wholly or partly of a rent, rent-charge, or other annual payment reserved or made payable to the vendor, or any other person, with or without a right of re-entry for non-payment thereof: see also sect. 10 (iv.).

These enactments replace stat. 24 & 25 Vict. c. 9, s. 1 (passed 17th May, 1861), by which exceptions were first introduced to the rule of stat. 9 Geo. II. c. 36, that the assurance must be without any provision for the benefit of the grantor. This must not be forgotten in considering the effect of assurances to charitable uses made before that date.

Lease for years of land to a charity.

It has been stated that the Mortmain, &c. Act, 1888, s. 4, renders a lease for charitable purposes, except those mentioned in the third part of the Act (see below, p. 430), void if it contain a reservation of a rent, other than a nominal rent, or any provision except as mentioned in sect. 4 in favour of the grantor; 2 Key & Elph. Prec. Conv. 354, n. (*a*), 10th ed. And it certainly is a question whether a lease for years to a charity at a substantial rent can validly be made. But having regard to the terms of sects. 4 (5, 7) and 10 (i., iv.) of the Act and to the rule that a lease of land is a sale *pro tanto* (above, p. 90, n. (*m*)), is it not arguable that a lease for years of land to a charity at a rack-rent, or at such a fine and rent as together make up a full and valuable consideration, may be valid?

(*d*) See stat. 51 & 52 Vict. c. 42, s. 4 (6).

(*e*) See sects. 4 (7), 10 (iv.), replacing stats. 9 Geo. II. c. 36, s. 2; 27 & 28 Vict. c. 13, s. 4.

Enrolment of separate deed of trust.

execution in the presence of witnesses and as to enrolment (*f*). And enrolment is not required of an assurance of land to or for the benefit of any charitable uses, if those uses are declared by a separate instrument, but in such case that separate instrument must be enrolled in the Central Office within six months after the making of the assurance of the land (*g*). Where any such assurance or instrument has not been duly enrolled within the requisite time, the High Court of Justice, or the officer having control over the enrolment of deeds in the Central Office, is empowered to order or cause the same to be subsequently enrolled; but this power is only exercisable where the Court or officer is satisfied, first, that the omission to enrol in proper time has arisen from ignorance or inadvertence, or through the destruction or loss of the document (*h*); and, secondly, that the assurance was of a nature to be validated under the following provision in this behalf. This enacts that if the assurance to be validated was made in good faith and for full and valuable consideration, and was made to take effect in possession immediately from the making thereof without any power of revocation, reservation, condition, or provision, except such as is authorised by the Act (*i*), and if, at the time of the application for enrolment, possession or enjoyment is held under the assurance, then such subsequent enrolment shall have the same effect as if it had been made within the requisite time; but such subsequent enrolment shall not give any validity to the assurance if at the time of such application any proceeding for setting aside the assurance or for asserting any right founded on the invalidity of the assurance is pending, or any decree or judgment founded on such invalidity has been obtained (*k*). Where an assurance of land to any charitable uses has not been executed by the assuror in the presence of two witnesses (*l*), or has otherwise failed to comply with the requirements of the

Power to enrol instruments not enrolled within due time.

(*f*) Stat. 51 & 52 Vict. c. 42, s. 9.

(*g*) Stat. 51 & 52 Vict. c. 42, s. 4 (6), replacing 24 & 25 Vict. c. 9, s. 2.

(*h*) In such case some copy or abstract thereof, or some subsequent instrument by which the trusts sufficiently appear, may be enrolled.

(*i*) Above, p. 426, n. (*c*).

(*k*) Stat. 51 & 52 Vict. c. 42, s. 5, replacing 35 & 36 Vict. c. 24, s. 13; 29 & 30 Vict. c. 57.

(*l*) Only the grantor or other assuror is required to execute the deed in the presence of two witnesses; it need not be so executed by the grantee or other person to whom the assurance is made; *Grieves* v. *Case*, 2 Cox, 301, 306.

Act, except only in respect of want of due enrolment, there is no power subsequently to amend the defect and the assurance remains altogether void (*m*). And an assurance failing to comply with the requirements of the Act is equally void whether the intended charitable uses or trusts appear from the assurance itself, from some separate instrument, or from other circumstances; so that if the trustees of a charity buy land with money belonging to the charity and take a conveyance to themselves, not disclosing their trust, the conveyance will be void unless made in accordance with the Act. And it must not be forgotten that conveyances of land to a charity for valuable consideration are void, as well as voluntary conveyances, if not made in accordance with the statutory requirements (*n*). If, however, the grantees under any assurance which is void for non-compliance with the present or former Mortmain Act (*o*) should have entered into possession of the land purported to be thereby assured, and remained in such possession long enough for the assuror's title to be extinguished under the Statutes of Limitation (*p*), they will have a good title to the land (*q*).

No power to amend other defects than want of enrolment.

The assurance will be void though the charitable trusts be not disclosed.

The charity may gain title under the Statutes of Limitation.

The above-mentioned restrictions of the Mortmain and Charitable Uses Act, 1888 (*r*), and the Mortmain Act of George II. (*s*) were imposed on the assurance to any charitable uses not only of land, but also of any tenements or hereditaments, corporeal or incorporeal, of whatsoever tenure, *and any estate or interest therein*. This had the effect of prohibiting the assurance to such uses, except in conformity with the statutory requirements, of money secured by mortgage of land and other property commonly called impure personalty (*t*). But

To what interests in land the Act extends.

(*m*) See *Wickham* v. *Bath*, L. R. 1 Eq. 17; *Webster* v. *Southey*, 36 Ch. D. 9.

(*n*) See *Doe* d. *Wellard* v. *Hawthorn*, 2 B. & A. 96, 101-103; *Doe* d. *Preece* v. *Howells*, 2 B. & Ad. 744; *A.-G.* v. *Gardner*, 2 De G. & S. 102; *A.-G.* v. *Munro*, ib. 122; *Bunting* v. *Sargent*, 13 Ch. D. 330; *Webster* v. *Southey*, 36 Ch. D. 9.

(*o*) Above, p. 425, notes (*s*, *t*).

(*p*) Stats. 3 & 4 Will. IV. c. 27; 37 & 38 Vict. c. 57.

(*q*) See *A.-G.* v. *Gardner*, 2 De G. & S. 102; *A.-G.* v. *Munro*, ib. 122; *Webster* v. *Southey*, 36 Ch. D. 9 (the case of a void lease for years for charitable uses); *Churcher* v. *Martin*, 42 Ch. D. 312; *Re Lacy*, 1899, 2 Ch. 149; *Re Peel's Release*, 1921, 2 Ch. 218, 222.

(*r*) Stat. 51 & 52 Vict. c. 42, s. 10 (iii.).

(*s*) Stat. 9 Geo. II. c. 36.

(*t*) See Wms. Pers. Prop. 507, 508, 17th ed.; 1 Jarm. Wills, 250 *sq.*, 6th ed.; *Re Hoyles*, 1911, 1 Ch. 179; *Re Dawson*, 1915, 1 Ch. 168, 626.

now by the Mortmain and Charitable Uses Act, 1891 (*u*), the provisions of the Act of 1888, relating to the assurance of land to charitable uses, apply only to land and tenements and hereditaments, corporeal or incorporeal, of any tenure, and no longer extend to money secured on land or other personal estate arising from or connected with land. By the Act of 1888, as by that of George II., every assurance (*v*) of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, was subjected to the like restrictions as were thereby imposed on the assurance of land to such uses (*x*); but with respect to the assurance by will of personal estate for such purposes, the law is now altered by the Act of 1891 (*y*) as stated below.

Assurance of personal estate to be laid out in purchase of land for a charity.

Exemptions from the requirements of the Mortmain Acts.

Part III. of the Mortmain and Charitable Uses Act, 1888, makes the following exemptions from the provisions of Part II. of the Act:—

(1.) An assurance of land, or personal estate to be laid out in the purchase of land, to or in trust for any of the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any of the colleges or houses of learning within any of those Universities, or to or in trust for any of the Colleges of Eton, Winchester, and Westminster, for the better support and maintenance of the scholars only upon the foundations of those last-mentioned colleges, or to or in trust for the warden, council, and scholars of Keble College(*z*).

(2.) An assurance, otherwise than by will, to trustees on behalf of any society or body of persons associated together for religious purposes or for the promotion of education, art, literature, science, or other like purposes, of land not exceeding two acres for the erection thereon of a building for such purposes, or any

(*u*) Stat. 54 & 55 Vict. c. 73, s. 3, repealing 51 & 52 Vict. c. 42, s. 10 (iii.).

(*v*) See above, p. 426, n. (*z*).

(*x*) Except that the transfer of stock in the public funds for such purposes is not required to be made by deed executed in the presence of two witnesses or to be enrolled, and remains valid unless the transferor die within *six* months thereafter: stat. 51 & 52 Vict. c. 42, s. 4.

(*y*) Stat. 54 & 55 Vict. c. 73, s. 7; see pp. 433, 434, below.

(*z*) Stat. 51 & 52 Vict. c. 42, s. 7 (i.), replacing 9 Geo. II. c. 36, s. 4, except as to London, Durham and Victoria Universities and Keble College: see Tudor's Charitable Trusts, 467-470, 4th ed.

of them, or whereon a building used or intended to be used for such purposes, or any of them, has been erected, so that the assurance be made in good faith for full and valuable consideration (*a*).

(3.) An assurance by deed of land of any quantity or an assurance by will of land of the quantity therein mentioned (*b*) for the purposes only of a public park, a school-house for an elementary school, a public museum (*c*), or an assurance by will of personal estate to be applied in or towards the purchase of land for all or any of the same purposes only; provided that a will containing such an assurance, and a deed containing such an assurance and made otherwise than in good faith for full and valuable consideration, must be executed not less than twelve months before the death of the assuror, or be a reproduction in substance of a devise made in a previous will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the assuror, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator, or in case of a deed the execution of the deed (*d*).

(4.) Where by any statute in force any provision repealed by the Act of 1888 is excluded either wholly or partially from application or is applied with modification, in every such case the corresponding provision of that Act shall be excluded or applied in like extent or manner (*e*). This refers to the cases in which exemption from all or some of the restrictions imposed by

(*a*) Stat. 51 & 52 Vict. c. 42, s. 7 (ii.), replacing 31 & 32 Vict. c. 44, s. 1. Such assurance may, however, be enrolled, if thought fit.

(*b*) Not exceeding twenty acres for any one public park, two acres for any one public museum, and one acre for any one school-house: stat. 51 & 52 Vict. c. 42, s. 6 (3).

(*c*) See s. 6 (4) for the definition of these terms.

(*d*) Stat. 51 & 52 Vict. c. 42, s. 6, replacing 34 & 35 Vict. c. 13, and also exempting the assurances therein mentioned from the operation of Part I. of the Act; see above, p. 426.

By stat. 55 Vict. c. 11, this exemption is extended to any assurance by deed of land to a local authority for any purpose for which such authority is empowered by any Act of Parliament to acquire land, without the requirement that an assurance not made for valuable consideration must be executed not less than twelve months before the assuror's death.

(*e*) Stat. 51 & 52 Vict. c. 42, s. 8.

the Mortmain Act of George II. has been granted by statute in favour either of particular charitable institutions or bodies or of assurances for certain particular purposes (*f*).

Besides these exemptions, it was considered that the Mortmain Act of George II. (*g*) had no application in case of land, which was already in mortmain by reason of its being lawfully vested in a corporation; and it was decided on this ground that the conveyance of land to charitable uses by an ecclesiastical or an eleemosynary corporation was not subject to any of the restrictions imposed by that Act (*h*). And following the spirit of these decisions, it was further held that, when land had been

(*f*) See Tudor's Charitable Trusts, 470-476, 4th ed.; 1 Jarm. Wills, 270-274, 6th ed.; Index to Statutes, Mortmain, 2, 3. With regard to particular charitable institutions specially authorized by statute to take lands, where these are corporations, it must be considered whether they are exempted from the provisions of Part I. only of the Mortmain and Charitable Uses Act, 1888 (above, p. 426), or whether they have been granted a dispensation from the restrictions imposed by Part II. of the Act: see *Nethersole* v. *School for Indigent Blind*, L. R. 11 Eq. 1; *Chester* v. *Chester*, L. R. 12 Eq. 444; cf. *Perring* v. *Trail*, L. R. 18 Eq. 88. As to assurances for particular charitable purposes, there are numerous instances in which the Legislature has exempted the assurance of land or of limited quantities of land for objects regarded as laudable from all or some of the requirements of Part II. of the Act of 1888, and also from the provisions of Part I. of the Act. Amongst these are the augmentation of benefices, the building of churches (see Tudor's Charitable Trusts, 473, 773 *sq.*, 785 *sq.*, 4th ed.), the provision of public recreation grounds (stat. 22 Vict. c. 27), and of dwellings for the working classes in populous places (stat. 53 & 54 Vict. c. 16), and the acquisition of land by institutions for promoting technical and industrial instruction and training (stat. 55 & 56 Vict. c. 29, s. 10). Other instances, in which also tenants for life or other limited owners are empowered to convey the whole estate in the land for the charitable purpose in question, are the provision of sites for schools (stats. 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49), for literary, scientific and like institutions (stat. 17 & 18 Vict. c. 112), and for places of worship or burial (stats. 30 & 31 Vict. c. 133; 36 & 37 Vict. c. 50; 45 & 46 Vict. c. 21). Also, by stat. 33 & 34 Vict. c. 34, the investment on mortgage of land of any money held by any corporation or trustees for any public or charitable purpose is exempted from the restrictions now contained in Part II. of the Mortmain Act of 1888, and also from any forfeiture for alienation of land into mortmain: but in every case in which the equity of redemption of the premises comprised in any such security shall become liable to foreclosure or otherwise barred or released, the same shall thenceforth be held in trust to be sold and converted into money, and shall be sold accordingly; and in any proceedings for redeeming or enforcing such security the decree shall direct (in default of redemption) a sale and not foreclosure.

Investment of charity moneys on mortgage of land.

(*g*) Stat. 9 Geo. II. c. 36.

(*h*) *Walker* v. *Richardson*, 2 M. & W. 882; *A.-G.* v. *Glyn*, 12 Sim. 84.

once duly assured into mortmain by reason of its having been vested in trustees for charitable purposes, the conveyance thereof to other trustees or to another charity did not fall within the purview of the same Mortmain Act, and needed not to be made with any of the formalities therein prescribed (*i*). And as the Mortmain and Charitable Uses Act, 1888 (*k*), is mainly a Consolidation Act (*l*), it is thought that the exemptions so established apply equally under the present law.

Gift of land by will to a charity.

The Mortmain Acts obviously prohibited the gift by will to a charity of any interest in land (*m*). But by the Mortmain and Charitable Uses Act, 1891 (*n*), land may be assured by will to or for the benefit of any charitable use. In such case, however, the land is, as a rule, required to be sold within one year from the death of the testator, or such extended period (*o*) as may be determined by the High Court, a Judge thereof at

(*i*) *Ashton* v. *Jones*, 28 Beav. 460.

(*k*) Stat. 51 & 52 Vict. c. 42: see the title.

Construction of Consolidation Acts.

(*l*) Consolidation Acts, which are Acts passed for the purpose of expressing existing *statute* law in a new form, are construed on principles different from those which govern the construction of statutes enacting new law or codifying the existing common or judge-made law. Thus the provisions of Consolidation Acts are considered to be retrospective, contrary to the general rule applicable to other statutes: *Ex p. Todd*, 19 Q. B. D. 186, 195, 199; they are construed with reference to the state of law which existed at the time when the enactments consolidated were originally passed: *Mitchell* v. *Simpson*, 25 Q. B. D. 183; *Stewart* v. *Thames Conservators*, 1908, 1 K. B. 893, 902, 903; *Re Laycock*, 1919, 1 Ch. 241, 247; their construction will be determined by the cases decided upon the construction of the original enactments: *Re Budgett*, 1894, 2 Ch. 557; *Re Pickard*, 1894, 3 Ch. 704; *Norton* v. *Davison*, 1899, 1 Q. B. 401; *The Heather Bell*, 1901, P. 143, 272; and the Acts consolidated may be referred to as a guide to the meaning of the consolidating Act, if ambiguous; *R.* v. *Abrahams*, 1904, 2 K. B. 859. Statutes purporting to codify the common law are construed primarily according to the expressions used therein, and not by reference to the previous law; *Bank of England* v. *Vagliano*, 1891, A. C. 107, 120, 144, 145, 160, 161. And enactments contained in Consolidation Acts but differing materially in wording from the former provisions on the same subject in the Acts consolidated are also so construed; *McConnell* v. *E. Prill & Co., Ltd.*, 1916, 2 Ch. 57, 63.

Codifying Acts.

(*m*) Above, p. 426.

(*n*) Stat. 54 & 55 Vict. c. 73 (passed 5th August, 1891), s. 5; see *Re Bridger*, 1894, 1 Ch. 297; *Re Hume*, 1895, 1 Ch. 422. The Act only applies to wills of testators dying after the passing thereof (sect. 9), and is not to limit or affect the exemptions contained in Part III. of the Mortmain and Charitable Uses Act, 1888 (above, p. 430), or to apply to any land or personal estate to be laid out in the purchase of land acquired under any assurance to which such exemptions or any of them apply (sect. 10).

(*o*) See *Re Sidebottom*, 1901, 2 Ch. 1.

chambers, or the Charity Commissioners (*p*); and if such time shall expire without completion of the sale of the land, it shall forthwith vest in the official trustee of charity lands, and the Charity Commissioners shall take all necessary steps for the sale or the completion of the sale thereof (*q*). And the assurance by will of any personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses is no longer rendered void; for the Act provides that any personal estate so assured shall be held to or for the benefit of the charitable uses specified as though there had been no direction to lay it out in the purchase of land (*r*). But the High Court, a Judge thereof at chambers, or the Charity Commissioners, if satisfied that any land assured by will to or for the benefit of any charitable uses, or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity, and not as an investment, may by order sanction the retention or acquisition, as the case may be, of such land (*s*). As we have seen (*t*), the Act also exempted money secured on land or other personal estate arising from or connected with land from the requirements of the Act of 1888 (*u*), thus allowing for the future the bequest to charities of impure personalty. It has been held that, where land is devised to trustees on trust to sell the same and hand over the proceeds of the sale to a charity, the bequest to the charity is of personal estate arising from land, and the case is governed by the last mentioned provision of the Act of 1891, and not by the provisions (*x*) relating to the devise of land to or for the benefit of any charitable use. In such case, therefore, the land is not required to be sold within a year after the testator's death; and the time for exercising the trust for sale is decided by the rules generally applicable to such trusts (*y*); but the trustees are bound to sell within a reasonable time, and cannot, with the consent of the charity, postpone the sale indefinitely (*z*).

(*p*) See note (*n*), above, p. 433.
(*q*) Sect. 6; *Re Ryland*, 1903, 1 Ch. 467.
(*r*) Sect. 7; see *Re Sutton*, 1901, 2 Ch. 640.
(*s*) Sect. 8; see *Re Ryland*, 1903, 1 Ch. 467, 474.
(*t*) Above, pp. 429, 430.
(*u*) Sect. 3.
(*x*) Sects. 5, 6, 8, above.
(*y*) Above, p. 242.
(*z*) *Re Wilkinson*, 1902, 1 Ch. 841; *Re Sidebottom*, 1902, 2 Ch. 389; see also *Re Ryland*, 1903, 1 Ch. 467.

Contract to sell land for the use of a charity.

It is a question whether a contract to sell land to be assured to some charitable use is affected by the provisions contained in Part II. of the Mortmain and Charitable Uses Act, 1888 (*a*). This depends on the question whether such a contract is an assurance of the land within the meaning of that Act (*b*); for every *assurance* (in the ordinary legal meaning of the word, apart from statute) of land to any charitable uses must be made in conformity with the Act and, unless so made, is void. Such a contract is not of course an assurance of any legal estate in the land: but it has the effect in equity of an immediate conveyance to the purchaser of the whole equitable estate in the land purchased (*c*); it operates in fact as a transfer of the equitable ownership of the property sold, and seems therefore to come within the definition of an assurance, unless the term, as used in the Act, is to be confined to conveyances of some legal estate or interest (*d*), or is not to extend to conveyances of the equitable estate effected by the rule of equity, that what is agreed to be done shall be treated as actually accomplished (*e*). Such a restriction of the term would have the remarkable result that, whilst an actual conveyance of land on the completion of a sale to a charity would be void (say) if it were attested by one witness only (*f*), a sale effected by a written contract and subsequent payment of the purchase money without further conveyance would be unimpeachable, though the contract were not made by deed, nor attested by any witness, nor enrolled. A door would in fact be left open for evasion of the Act (*g*). It has been held that, where a contract for the sale of land to some charitable use had been actually completed by a deed of conveyance, which was void for non-compliance with the old Mortmain Act, the whole transaction was void in equity as well as at law, and the land was not subject to the charitable trusts as having been effectually appropriated thereto by the

(*a*) Stat. 51 & 52 Vict. c. 42; above, p. 426.
(*b*) See above, p. 426, and n. (*z*).
(*c*) Above, p. 46; below, Chap. XI. § 1.
(*d*) The Act originally extended in express terms to assurances of land or any hereditaments, *or any estate or interest therein*, but was restricted by the Act of 1891 to assurances of land and hereditaments; see above, p. 430.
(*e*) See Wms. Real Prop. 193, 196, 197, 23rd ed.
(*f*) See above, pp. 426-429.
(*g*) As to the way in which the Court has dealt with an attempted evasion of the Act, see *Wickham* v. *Bath*, L. R. 1 Eq. 17.

contract of sale (*h*). This seems to show that the contract for sale could not have had the usual effect of transferring the equitable ownership of the land sold to the purchaser; for if it had had that effect, the land would have remained subject to the charitable trusts, though the subsequent conveyance of the legal estate were void. But if the equitable ownership of the land were not transferred by the contract, that could only be because the contract was an assurance thereof not made as required by the Mortmain Act and therefore void (*i*). On the other hand, it has been decided that an ordinary contract for the sale of land is neither an assurance within the meaning of the Yorkshire Registries Act, 1884 (*k*), nor a conveyance within the meaning of the Stamp Acts (*l*), on the ground, partly, that the contract does not operate as an immediate and unconditional transfer of the equitable estate to the purchaser, because such transfer is conditional on the vendor showing a good title. To this it may be replied that in the Yorkshire Registries Act, 1884 (*m*), the term *assurance* is specially interpreted, and has not its ordinary legal meaning apart from statute; that in the Stamp Acts a clear distinction is drawn between the stamps required for a contract and those necessary for a conveyance (*n*); that it has been held that, where a declaration of trust, whether express or implied from the terms of an agreement for sale, is

(*h*) *A.-G.* v. *Gardner*, 2 De G. & S. 102, 116, 118; cf. *A.-G.* v. *Munro*, ib. 122, as to enforcing charitable trusts against persons who have taken and remained in possession of land, as trustees for a charity under a conveyance void for non-compliance with the Mortmain Act.

(*i*) See stat. 9 Geo. II. c. 36, ss. 1, 3. It should be observed that sect. 1 of this Act contained an absolute prohibition against in any ways conveying to any charitable use any hereditaments for any estate or interest whatever unless with the formalities therein specified, and sect. 3 made void all assurances, made otherwise than as directed by the Act, of any hereditaments or any estate or interest therein to any charitable use. The Act of 1888, though purporting to be a consolidating Act, does not reproduce in express terms the exact prohibition contained in sect. 1 of the old Act; see above, pp. 426, 433, and n. (*l*). It is thought that the *dictum* in *A.-G.* v. *Day*, 1 Ves. sen. 218, 222, that a sale effected by a written contract and payment (before conveyance) of the purchase money is sufficiently taken out of the Act, is not an authority for anything more than that the transaction is not liable to be avoided by the vendor's death within a year; for it seems indisputable that if in such case the sale were completed by a conveyance attested by one witness only, the conveyance would be void.

(*k*) *Rodger* v. *Harrison*, 1893, 1 Q. B. 161; above, p. 364, n. (*b*).

(*l*) *Inland Revenue Commrs.* v. *Angus*, 23 Q. B. D. 579.

(*m*) Stat. 47 & 48 Vict. c. 54, s. 3; above, p. 364, n. (*b*).

(*n*) See *Inland Revenue Commrs.* v. *Angus*, ubi sup.; above, p. 29 and n. (*a*); below, Chap. XII. § 3.

in effect a conveyance of an equitable estate on sale, it ought to be stamped as such (*o*); and that, though the transfer of the equitable estate effected by a contract of sale is conditional on a good title being shown, the condition is in substance subsequent rather than precedent. If the contract be not rescinded or broken, the equitable estate vests in the purchaser as from the date of his entering into the contract (*p*); and if a good title be shown, he has no option of rejecting it (*q*). The real effect of the contract appears to be that the equitable ownership of the property sold is at once transferred to the purchaser, subject to the vendor being restored to his former ownership in case (contrary to the parties' main intention in making the sale) the contract be rescinded or broken (*r*). In this view of the transaction, the contract does appear to be an assurance to the purchaser of the equitable estate in the land sold. But it is certainly open to argument that the amendment made by the Act of 1891 (*s*) in restricting the Act of 1888 to assurances of any lands, tenements or hereditaments, and expressly repealing the old provisions applying to assurances of "any estate or interest therein," has the effect of confining the operation of the Act of 1888 to assurances of the legal estate in hereditaments (*t*). If however this argument should prevail, a simple declaration of trust made gratuitously in favour of a charity and evidenced by signed writing (*u*) would be sufficient to transfer to the charity the whole equitable estate in the lands affected; and the Courts would certainly struggle against this conclusion.

Restriction on the sale, mortgage, or leasing of charity lands.

By sect. 29 of the Charitable Trusts Amendment Act, 1855 (*v*), it shall not be lawful for the trustees or persons acting

(*o*) Channell, J., *West London Syndicate* v. *Inland Rev. Commrs.*, 1898, 1 Q. B. 226, 240; *Chesterfield Brewery Co.* v. *Inland Rev. Commrs.*, 1899, 2 Q. B. 7.

(*p*) Above, p. 46, and n. (*m*); below, Chap. XI. § 1.

(*q*) Above, pp. 34, 43; *Re Taylor*, 1910, 1 K. B. 562, 571, 572, 580; below, Chap. XII.

(*r*) See below, Chap. XIX. §§ 1, 2.

(*s*) Stat. 54 & 55 Vict. c. 73, s. 3; above, pp. 430, 435, n. (*d*).

(*t*) See *Gentle* v. *Faulkner*, 1900, 2 Q. B. 267.

(*u*) See Wms. Real Prop. 200, 23rd ed.; *Adlington* v. *Cann*, 3 Atk. 141, 150; *Boson* v. *Statham*, 1 Eden, 508, 513.

(*v*) Stat. 18 & 19 Vict. c. 124, passed 14th August, 1855. According to the previous law the alienation of charity lands was not absolutely prohibited, but was liable to be set aside if not provident and beneficial to the charity. And a sale or other alienation of charity lands might well be made under the direction of the Court of Chancery,

in the administration of any charity to make or grant, otherwise than with the express authority of Parliament (*w*), under any Act already passed or which may hereafter be passed, or of a Court or Judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board of Charity Commissioners, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years. It is held that this enactment absolutely prohibits any disposition of charity lands in contravention of the restrictions thereby imposed (*x*); and any such disposition is altogether void (*y*). And it has been held that the expressions in the Act authorising alienation under a scheme legally established relate only to schemes for the administration of charities made under the jurisdiction in that behalf inherited by the High Court from the Court of Chancery or conferred by the Charitable Trusts Acts (*z*); so that the trustees of charities are no longer at liberty to exercise express powers of alienation conferred on them by the author of the trust, except in accordance with the restrictions of the Act of 1855 (*a*). The word "charity" in this Act includes every institution in England or Wales endowed for charitable purposes, but not any charity or institution expressly exempted

or by the trustees of a charity acting under express powers conferred by the author of the trust. But if a sale or other disposition of charity lands were made by the trustees without the authority of the Court or any such express powers, the burden lay on the purchaser or other person taking under the disposition of proving that the transaction was provident and beneficial to the charity; and if he failed to establish this the disposition would be set aside, unless the defence of purchase for value without notice of the trust, or of the Statute of Limitations, could be maintained. See *A.-G.* v. *Warren*, 2 Swanst. 291, 302; *A.-G.* v. *Hungerford*, 2 Cl. & Fin. 357; *A.-G.* v. *Brettingham*, 3 Beav. 91; *A.-G.* v. *South Sea Co.*, 4 Beav. 453; *Magdalen College, Oxford* v. *A.-G.*, 6 H. L. C. 189, 205, 213; *Re Ashton Charity*, 22 Beav. 288; *Re Clergy Orphan Corp.*, 1894, 3 Ch. 145, 154; *Re Mason's Orphanage and London and North Western Rail. Co.*, 1896, 1 Ch. 54, 59, 603, 604.

(*w*) See *Re Verrall*, 1916, 1 Ch. 100, 108.

(*x*) *Re Mason's Orphanage, &c.*, 1896, 1 Ch. 54, 596; *Fell* v. *Official Trustee of Charity Lands*, 1898, 2 Ch. 44.

(*y*) *Bangor* v. *Parry*, 1891, 2 Q. B. 277.

(*z*) See Tudor's Charitable Trusts, 3, 181 *sq.*, 184 *sq.*, 195 *sq.*, 593, 596 *sq.*, 4th ed.; stats. 16 & 17 Vict. c. 137, ss. 28, 29, 32, 43; 23 & 24 Vict. c. 136, s. 2.

(*a*) *Re Mason's Orphanage, &c.*, 1896, 1 Ch. 54, 596; *A.-G.* v. *National Epileptic Hospital*, 1904, 2 Ch. 252; *A.-G.* v. *Mathieson*, 1907, 2 Ch. 383.

from the operation of the Charitable Trusts Act, 1853; and the Act of 1855 does not extend to any case excepted by sect. 62 of the Act of 1853 from the operation thereof (*b*). These exceptions are stated in the note (*c*), and regard must of course be

(*b*) Stat. 18 & 19 Vict. c. 124, ss. 47, 48.

(*c*) By sect. 62 of the Charitable Trusts Act, 1853, this Act shall not extend to—

(1) The Universities of Oxford, Cambridge, London or Durham, or any college or hall in the said Universities of Oxford, Cambridge and Durham; or to

(2) Any cathedral or collegiate church (see *Re Dod's Charity*, 1905, 1 Ch. 442); or to

(3) Any building registered as a place of meeting for religious worship with the Registrar-General of Births, Deaths or Marriages in England or Wales, and *bonâ fide* used as a place of meeting for religious worship (see stats. 18 & 19 Vict. c. 81, s. 9; 32 & 33 Vict. c. 110, s. 15). This exemption is extended by the Charitable Trusts (Places of Religious Worship) Amendment Act, 1894, 57 & 58 Vict. c. 35, s. 4, to (a) any forecourt, yard, garden, burial-ground, vestry, or caretaker's house, in respect of situation connected with, and held upon the same trusts as, any building registered and *bonâ fide* used as aforesaid; and (b) any Sunday-school house or other land or building which shall be certified by an order of the Charity Commissioners, made upon the application of one or more of the trustees or persons acting in the administration thereof, to be held upon the same trusts as any building registered and used as aforesaid or upon like trusts, and to be in respect of situation so connected with such building that it cannot conveniently be separated therefrom. Or to

(4) The Commissioners of Queen Anne's Bounty; or to

(5) The British Museum; or to

(6) Any friendly or benefit society or savings bank; or to

(7) Any institution, establishment, or society for religious or other charitable purposes, or the auxiliary or branch associations connected therewith, *wholly maintained by voluntary contributions;* or to

(8) Any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and

(9) Where any charity is *maintained partly by voluntary subscriptions and partly by income arising from any endowment,* the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the Board of Charity Commissioners or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart

had to them in advising on the title to any land sold by charity trustees.

or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act; and

(10) Nothing in this Act shall subject the funds or property of any missionary or other similar society, or the missionaries, teachers, or officers of such society, or of any branch thereof, which funds or property shall not be within the limits of England or Wales, to the jurisdiction of the said Board:

Provided always, that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools. See also sect. 66.

Charities wholly maintained by voluntary contributions.

It has been held that, by charities wholly maintained by voluntary contributions, it is intended to describe charities which have no invested endowment yielding an income for their support, or other property permanently available for the purposes of the charity (as freehold land owned and occupied for such purposes), but are entirely dependent on the gifts of the benevolent, whether recurrent or occasional, and whether *inter vivos* or by will; *A.-G.* v. *Mathieson*, 1907, 2 Ch. 383; *Re Orphan Working School and Alexandra Orphanage's Contract*, 1912, 2 Ch. 167, 176; *Re Richard Murray Hospital*, 1914, 2 Ch. 713. With regard to charities maintained partly by voluntary subscriptions and partly by income arising from any endowment, it has been held that the income of any endowment *primâ facie* means income derived from any invested funds; that in the case of such charities, bequests and donations for the general purposes of the charity, which may lawfully be applied as income consistently with the terms of the gift, are exempt from the operation of the Acts; and that, so long as they remain so applicable as income, such gifts and the income thereof are not brought within the operation of the Acts by being invested, even in the purchase of land. So that in the case of the last-mentioned charities, land bought by the trustees with the produce of such gifts can be disposed of without the consent of the Charity Commissioners, and, further, appears to be alienable by the trustees at their discretion without subjecting the purchaser to the burden of proving that the alienation was beneficial to the charity; above, p. 437, n. (*v*); see *Re Clergy Orphan Corporation*, 1894, 3 Ch. 145, 150, 154; *Royal Society of London and Thompson*, 17 Ch. D. 407; *Finnis and Young to Forbes and Pochin*, 24 Ch. D. 587, 591; *Re Gilchrist Educational Trust*, 1895, 1 Ch. 367; *Re Stockport, &c. Schools*, 1898, 2 Ch. 687; *Re Church Army*, 1906, W. N. 73; 94 L. T. 559; *A.-G.* v. *Mathieson*, 1907, 2 Ch. 383, 393; *Re Society for training Teachers of the Deaf and Whittle's Contract*, ib. 486; *Re Wesleyan Methodist Chapel, South Street, Wandsworth*, 1909, 1 Ch. 454; *Re Orphan Working School and Alexandra Orphanage's Contract*, ubi sup.; *A.-G.* v. *Foundling Hospital*, 1914, 2 Ch. 154; see also *Corporation of Sons of Clergy and Skinner*, 1893, 1 Ch. 178; *sed quære* whether this case is consistent with *Re Mason's Orphanage, &c.*, 1896, 1 Ch. 54, 596. If however any land so purchased be by deed or otherwise so settled or appropriated to some particular charitable purposes that it is no longer competent for the governing body of the charity to apply the proceeds of a sale thereof as income, it will become an endowment and

"Mixed charities."

Dispositions of charity lands by authority of the Charity Commissioners.

Under the Charitable Trusts Act, 1853 (*d*), the Charity Commissioners may authorise the sale, exchange, mortgage (*e*), or leasing of charity lands, where advantageous to the charity; and leases, sales, exchanges, and other transactions so authorised shall have the like effect and validity as if they had been authorised by the express terms of the trust affecting the charity (*f*). Thus, where express powers of alienation have not been conferred on the trustees of charity lands, the Charity Commissioners may authorise provident dispositions thereof (*g*); and where such express powers have been conferred, the approval of the Charity Commissioners is generally necessary to their exercise (*h*). Where the title to any land sold depends on any disposition of charity lands, to which the authority or approval of the Charity Commissioners is necessary, the order of the Commissioners giving such authority or approval should be abstracted and produced; and if this be not done, the order should be inquired for, and in default of the production of such an order, objection should be taken to the title. The order of the Charity Commissioners authorising a disposition of charity lands does not of course operate as a conveyance of the legal estate therein; that must be duly assured in order to give effect to the disposition authorised (*i*). Such assurance may be made either by the person or all the persons seised of the legal estate, or else under sect. 12 of the Charitable Trusts Act, 1869 (*k*), providing that, where the trustees or persons

Assurance of the legal estate in charity lands.

be subject to the jurisdiction and control of the Charity Commissioners; *A.-G.* v. *Mathieson,* ubi sup. And it appears that an assurance of land made on founding a charity must always be an endowment, though applicable for the general purposes of the charity or as income; because such a gift, either of land or personalty, is not a "voluntary contribution," nor can the charity *then* be a "mixed charity"; for though it may have power to receive voluntary contributions, it is not a mixed charity until it has actually received them; *Re Gilchrist Educational Trust,* 1895, 1 Ch. 367; *Re Richard Murray Hospital,* ubi sup.; see also *Re Child Villiers' Application,* 1922, 1 Ch. 394.

(*d*) Stat. 16 & 17 Vict. c. 137, ss. 21, 24.

(*e*) See also stats. 18 & 19 Vict. c. 124, s. 30; 23 & 24 Vict. c. 136, s. 15.

(*f*) Stat. 16 & 17 Vict. c. 137, s. 26.

(*g*) The jurisdiction of the High Court to authorise such dispositions (above, p. 437, n. (*v*)) remains; but under the Charitable Trusts Act, 1853, no application can be made to the Court for such purpose without the certificate of the Charity Commissioners: stat. 16 & 17 Vict. c. 137, s. 17.

(*h*) Above, pp. 437, 438.

(*i*) Mortgagees of charity lands, however, are generally satisfied with the provision for repayment made by the Charity Commissioners' Order: see Tudor's Charitable Trusts, 528, 4th ed.

(*k*) Stat. 32 & 33 Vict. c. 110.

acting in the administration of any charity have power to determine on any sale, exchange, partition, mortgage, lease, or other disposition of any property of the charity, a majority of those trustees or persons who are present at a meeting of their body duly constituted and vote on the question shall have and be deemed to have always had full power to execute and do all such assurances, acts and things as may be requisite for carrying any such sale, exchange, partition, mortgage, lease, or disposition into effect, and all such assurances, acts and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being and by the official trustee of charity lands. This section appears to be applicable where the power of determining on a sale or other disposition of the charity lands has been conferred on the trustees by order of the Charity Commissioners or of the Court; and it enables the majority of the trustees to convey the legal estate in the land, whether the same be vested in the whole number of trustees or in the official trustee of charity lands (*l*). But where the title to any land sold depends on an assurance executed under this section, proof must be given that the persons who executed the same were the majority of those present at a meeting of their body duly constituted and voting on the question (*m*). As the Charitable Trusts Act, 1869 (*n*), is to be construed as one with the Charitable Trusts Acts, 1853 and 1855, it does not appear to apply in cases excepted from the operation of these Acts (*o*). In such cases, therefore, all persons seised of the legal estate in the charity lands must concur in executing any assurance thereof. Where any land sold has been held by a succession of charity trustees, of course the appointments of any new trustee and the conveyances consequent on such appointment form part of the title, and must be abstracted and produced accordingly. Under the Trustees Appointment Acts, 1850 to 1890 (*p*), lands held in trust for certain religious or educational purposes vest in new trustees

(*l*) See stats. 16 & 17 Vict. c. 137, ss. 47-50; 18 & 19 Vict. c. 124, s. 15; Davidson, Prec. Conv. vol. ii. pt. i. pp. 470-472, nn., 475 *sq.*, 4th ed.

(*m*) 1 Dart, V. & P. 288, 289, 5th ed.; 329, 6th ed.; 325, 7th ed. As to what is a duly constituted meeting, see *Young* v. *Imperial Ladies' Club, Ltd.*, 1920, 2 K. B. 523.

(*n*) Stat. 32 & 33 Vict. c. 110, s. 3.

(*o*) Above, p. 439, and n. (*c*).

(*p*) Stats. 13 & 14 Vict. c. 28; 32 & 33 Vict. c. 26; 53 & 54 Vict. c. 19.

duly appointed, or in such new trustees together with the continuing trustees, without any express conveyance for the purpose.

Board of Education substituted for Charity Commissioners as to endowments held solely for educational purposes.

Under the Board of Education Act, 1899 (*q*), and the Orders in Council made thereunder (*r*), all the powers conferred on the Charity Commissioners by the enactments above mentioned (*s*) were, so far as those powers relate to endowments held solely for educational purposes, transferred to the Board of Education.

§ 8.—*Partnership property.*

Partnership property.

Where a purchaser has notice that any land sold is or has been partnership property, he must ascertain that the same has been or shall be duly assured, not only by all persons seised of the legal estate therein, but also by all persons interested therein in equity under the agreement of partnership (*t*). As is well known, when any land becomes partnership property, the legal estate therein devolves according to the general law applicable to land of the like nature and tenure: but in equity the land is held in trust for the partners, who are entitled thereto, as between themselves and their representatives, as personal estate (*u*). The devolution at law of real estate, which is partnership property, varies, of course, according as it has been dealt with. It may have been conveyed to the partners or some of them only, as joint tenants in fee or as tenants in common, or to one partner only in fee, or it may have been vested in trustees, none of whom were partners. But in whatever form the conveyance was taken, the subsequent devolution of the legal estate is to be traced according to the general rules governing the

(*q*) Stat. 62 & 63 Vict. c. 33, s. 2 (2).

(*r*) See orders of 7th Aug. 1900, 24th July, 1901, 11th Aug. 1902; Tudor's Charitable Trusts, 760-769, 4th ed.

(*s*) Above, pp. 434, 438, 441, 442.

(*t*) See *Cavander* v. *Bulteel*, L. R. 9 Ch. 79, where the defendants, having taken from one Bewlay a mortgage of land, of which at law he was solely seised in fee, but which in equity belonged to him and the plaintiff as partners, were held to have had constructive notice of the firm's title, because they were aware that the business of the firm was carried on there. And see above, pp. 224 *sq.*

(*u*) See stat. 53 & 54 Vict. c. 39, ss. 20-22; *Darby* v. *Darby*, 3 Drew. 495; *Waterer* v. *Waterer*, L. R. 15 Eq. 402; *A.-G.* v. *Hubbuck*, 13 Q. B. D. 275; *Re Bourne*, 1906, 2 Ch. 427, 429, 432, 433.

devolution of real estate held upon trust (*x*). Prior to the year 1882, therefore, if a person (whether a partner or not) were solely seised in fee of land held in equity as partnership property, the legal estate passed, on his death, to his heir or devisee; but the heir or devisee was held to be a trustee for the persons entitled under the partnership agreement (*y*). Since the end of the year 1881, it appears that, in the same circumstances, the legal estate passes to the deceased tenant's personal representatives under the Conveyancing Act, 1881 (*z*).

(*x*) Land, which is partnership property, is in effect held upon trust for sale and conversion into money and application of the proceeds of the sale, first, in discharging the partnership liabilities and subject thereto in dividing the same between the partners in proportion to their interests: *Darby* v. *Darby*, 3 Drew. 495; *A.-G.* v. *Hubbuck*, 10 Q. B. D. 488, 13 Q. B. D. 275, 289; stat. 53 & 54 Vict. c. 39, ss. 20 (2), 22, 44; *Re Bourne*, 1906, 2 Ch. 427, 432, 433.

(*y*) *Broom* v. *Broom*, 3 My. & K. 443; *West of England, &c. Bank* v. *Murch*, 23 Ch. D. 138; above, p. 202.

(*z*) Stat. 44 & 45 Vict. c. 41, s. 30; above, p. 204. It is submitted that the cases cited in the two preceding notes establish that the estate, even when vested in a partner or in all the partners, is held upon a trust within the meaning of this enactment. Where land has been vested in partners as joint tenants in fee, but as part of their partnership estate (see 1 Key & Elph. Prec. Conv. 438, 4th ed.; 518, 10th ed.), or as tenants in common in equal shares, the case of *Re Selous*, 1901, 1 Ch. 921, may perhaps be thought to raise a doubt whether the partners can have different interests in the land in equity from what they have at law. In that case, one who was a trustee of leaseholds for two ladies in equal shares, by deed reciting that they had requested him to execute to them such assignment thereof as was thereinafter expressed, assigned the same to them as joint tenants, and they jointly covenanted to indemnify him against the rent and lessee's covenants. On the death of one of the ladies her executors claimed her share on the ground that in equity the ladies had remained tenants in common. Farwell, J., decided against this claim, holding that the case came within the rule in *Selby* v. *Alston*, 3 Ves. 339, that where equitable and legal estates, equal and co-extensive, unite in the same person, the former merges, or in other words, that a person cannot be a trustee for himself. He said: "The only doubt I felt was whether the advantage of a tenancy in common over a joint tenancy raised any presumption against merger. But the difference in interest between these two estates is *so small and shadowy* that I do not think it would be sufficient to raise that presumption. I hold that two or more persons cannot be trustees for themselves for an estate co-extensive with their legal estate." It is respectfully submitted that the learned judge rightly rejected the executors' claim, but for the wrong reasons. The deed of assignment was a conveyance by a trustee under a simple trust, who had been requested by his *cestui que trusts* to execute the estate to them. In such conveyance the limitation of the estate was expressly made to the *cestui que trusts* as joint tenants at their own request; their intention to take as such was plainly evidenced by the deed which they executed themselves. Why, then, should there be any equity to preserve their estate in common contrary to their expressed intention? (See *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343.) Suppose, however, that they had taken the assignment to

Re Selous.

Persons to concur in disposition.

As regards the persons, who should concur in a disposition of land, which is partnership property, as being entitled under the partnership agreement, it is to be observed, first, that one partner has no general authority arising from the relation of partnership to bind the firm or the other partners by deed or to execute a deed on their behalf (*a*); and, secondly, that one partner may, it seems, make an equitable mortgage of the firm's land to secure the firm's debt (*b*); but,

themselves jointly on trust as to one moiety for the one and as to the other moiety for the other, or, which is the same thing, on trust for themselves as tenants in common in equal shares. Would the Court then have rejected the executors' claim? We think not. It is respectfully submitted that the learned Judge's *dictum* as to the difference between joint tenancy and tenancy in common being small and shadowy was an incautious utterance. There is nothing to prevent a man from being a trustee for himself and others, or from being one of several trustees for himself. If lands are conveyed to the use of A. and B. in fee as joint tenants on trust for them in fee in equal shares, each undivided moiety is, in equity, held by a several title: see Litt. s. 292. At law A. and B. are joint tenants in fee; each is therefore seised of the whole. But in equity A. and B. have no interest in each other's shares; each has a several title to one half only. In all except unity of possession the case is the same as if two separate pieces of land had been assured to the use of A. and B. in fee on trust, as to one for A. in fee, and as to the other for B. in fee. How, then, can it possibly be maintained that their estates in equity are co-extensive and commensurate with their estates in law? And where the equitable estate is not commensurate with the legal estate in the same person, there is no merger: see *Brydges* v. *Brydges*, 3 Ves. 120, which was not cited in *Re Selous*. The rule in *Selby* v. *Alston* has never been supposed to apply to land assured to the use of partners in fee as part of their partnership estate; and the case of *Re Selous* certainly affords no good reason why the construction previously placed on such assurances should be in any way disturbed. The interest which the partners take in equity by reason of their interest in the partnership is altogether different from that which they have by reason of their tenancy at law: see note (*x*), above. And it is contrary to the principles of equity that an equitable interest in any property, which interest has become vested in the legal or equitable owner of the property, but is not of exactly the same nature as his ownership, shall merge in the ownership if it were not intended that such merger should take place: see *Forbes* v. *Moffatt*, 18 Ves. 384; *Adams* v. *Angell*, 5 Ch. D. 634; *Re Pride*, 1891, 2 Ch. 135; *Minter* v. *Carr*, 1894, 3 Ch. 498; *Thorne* v. *Cann*, 1895, A. C. 11; *Ingle* v. *Vaughan Jenkins*, 1900, 2 Ch. 368; *Thellusson* v. *Liddard*, ib. 635; *Capital and Counties Bank* v. *Rhodes*, 1903, 1 Ch. 631, 652, 653; *Re Fletcher*, 1917, 1 Ch. 339; *Fung Ping Shan* v. *Tong Shun*, 1918, A. C. 403, 410, 411. The cases of *Re Wray*, 1905, 2 Ch. 349, 352, *Re Bourne*, 1906, 2 Ch. 427, 432, 433, and *Re Kent County Gas, &c. Co., Ltd.*, 1909, 2 Ch. 195, show clearly that, where real estate is vested in partners as joint tenants, their beneficial interests therein are personalty in equity, and are according to their interests in the partnership property.

(*a*) *Harrison* v. *Jackson*, 7 T. R. 207; *Steiglitz* v. *Egginton*, Holt, 141; *Marchant* v. *Morton*, 1901, 2 K. B. 829, 832.

(*b*) See *Re Clough*, 31 Ch. D. 324; Lindley on Partnership, 166, 7th ed.; Pollock on Partnership, 35, 8th ed.

except where the ordinary business of the firm is to sell land (*c*), he has no general authority arising out of the relation of partnership to sell the firm's land (*d*). All dispositions, therefore, required by law to be made by deed of a partnership firm's estate or interest in any land must be executed by all the partners either personally or by attorney acting under an express power of attorney given by deed; and except in the case of an equitable mortgage to secure the firm's debt or a sale or lease by a firm whose ordinary business it is to sell or let land, all dispositions of the firm's equitable interest in any land, which is partnership property, must be made by all the partners; as, for instance, a contract for the sale or letting of the land where the business is carried on. After the dissolution of a partnership, whether by death or otherwise, the authority of each partner to bind the firm continues, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise: provided that the firm is in no case bound by the acts of a partner who has become bankrupt (*e*). It has been held that the survivor of two partners may make a good equitable mortgage by deposit of the title deeds of the firm's land to secure a firm debt (*f*), and that such a mortgage has priority over any lien of the deceased partner's executors on the surplus assets for his share in the partnership (*g*). And it has been laid down by the Court of Appeal that, on the dissolution of a partnership by the death of one of two partners, it is the duty of the surviving partner to realise all the assets of the firm, including its real estate, for the purpose of winding up the partnership affairs, and the surviving partner has for this purpose full power, not only to mortgage, but also to sell such real estate (*h*). Having regard to this pronouncement, it appears that, where the survivor of two partners sells the real estate sufficiently soon after the other partner's death to make it apparent that he is selling to wind up the partnership affairs, he can make a good title to the

Power of surviving partner to sell or mortgage the firm's lands.

(*c*) See stat. 53 & 54 Vict. c. 39, ss. 5, 6.

(*d*) See *Butchart* v. *Dresser*, 10 Hare, 453, 456, 4 De G., M. & G. 542; *Keen* v. *Mear*, 1920, 2 Ch. 574, 580.

(*e*) Stat. 53 & 54 Vict. c. 39, s. 38.

(*f*) *Re Clough*, 31 Ch. D. 324.

(*g*) *Re Bourne*, 1906, 2 Ch. 427.

(*h*) *S. C.*, 1906, 2 Ch. 430-433

equitable interest (*i*) in the land and give a good discharge for the purchase money without the concurrence of the deceased partner's legal personal representatives. And it is thought that this rule applies to partnerships entered into under an open contract (where the assets belong in equity to the surviving partner and the dead partner's personal representatives in equal shares), and to those under which the surviving partner is given an option to take over at a valuation the deceased partner's share of the assets of the firm (*k*), as well as to partnerships regulated by a stipulation that the surviving partner shall take over the dead partner's share at a valuation payable by instalments (*l*). But where a surviving partner has continued to carry on the business of the firm and remained in possession of land, which belonged to the firm, for a long time after the dissolution of the partnership and then sells the land, it is thought that he would have to prove, as part of his title, that he purchased the deceased partner's share of the assets of the firm from the dead man's personal representatives, either under a contract to that effect contained in the articles of partnership or otherwise, and that the purchase money therefor has all been duly paid.

(*i*) The title to the legal estate depends of course on the manner in which it was held on trust for the firm; see above, p. 443. If the land had been vested at law in the two partners as joint tenants in fee, the surviving partner alone could convey the entire legal estate.

(*k*) See Davidson, Prec. Conv. vol. 5, pt. ii. p. 355, 3rd ed. Such options must be exercised precisely according to their terms; *Vyse* v. *Foster*, 7 H. L. 318, 329; but it is thought that, if so exercised, they relate back to the time of their creation and amount to absolute contracts, deriving their effect from the articles of partnership, to purchase the deceased partner's share; see *Pearce* v. *Bulteel*, 1916, 2 Ch. 544, 555-557.

(*l*) The effect of such a stipulation is that, on the death of a partner the entire property in all the assets (including any real estate) belonging to the firm passes at once in equity to the surviving member of the firm; *Vyse* v. *Foster*, L. R. 8 Ch. 309, 328, 7 H. L. 318, 330, 334, 335, 341, 345; *Hordern* v. *Hordern*, 1910, A. C. 465, 473; and that the surviving partner has authority, for the purpose of winding-up the affairs of the partnership, to sell or mortgage such assets free from any lien of the personal representatives of the dead partner for the amount so payable to them; see *Re Langmead's Trusts*, 20 Beav. 20, 7 De G., M. & G. 353; *Re Bourne*, 1906, 2 Ch. 427. In *Re Bourne* the partnership contract contained such a stipulation (see 1906, 1 Ch. 113); but the case was decided on the footing of its being a partnership under an open contract, and the judgments delivered apply to a partnership of that kind. Before this decision, it was the practice of conveyancers, on the sale of partnership land by the surviving partner under an open contract of partnership, to require the personal representatives of the dead partner to concur in the conveyance and give a receipt for their share of the purchase money; see *Butchart* v. *Dresser*, 10 Hare, 453, 456, 4 De G., M. & G. 542, 544; *West of England, &c. Bank* v. *Murch*, 23 Ch. D. 138; 50 Sol. J. 307 (by the author).

§ 9.—*Sale by order of the Court.*

Title under an order for sale made by the Court.

Where the title to any land sold depends on an order for sale made by the Court (*m*), the principal points, on which the purchaser's advisers must satisfy themselves, are these: first, that the whole legal estate in the land has been conveyed to the person asserting title under the order, or will be conveyed to the purchaser, either by the assurance of all persons interested therein or by vesting order; secondly, that the order for sale was duly made and properly carried out, or if not, that the defect is one which may be disregarded in reliance on sect. 70 of the Conveyancing Act, 1881 (*n*); and thirdly, that all persons interested in the property sold for any equitable estate or interest were or are either parties to or otherwise bound by the proceedings in which the order for sale was made; or if not, that all estates or interests of all persons not so bound have been or will be expressly assured to the person asserting title under the order or to the purchaser. The jurisdiction of the High Court of Justice to order a sale of land (*o*) is either

Jurisdiction of the Court to order a sale of land.

(*m*) As to sales of land by the Court, see 2 Dart, V. & P. 1190 *sq.*, 5th ed.; 1313 *sq.*, 6th ed.; 1151 *sq.*, 7th ed.; 1 Dan. Ch. Pr. 938 *sq.*, 8th ed.; 1 Seton on Judgments, 324 *sq.*, 327, 7th ed.; 1 Davidson, Prec. Conv. 499 *sq.*, 5th ed. On a sale by the Court, the purchaser is not indefeasibly entitled to the benefit of his purchase until the Master's certificate of the result of the sale has become binding; see *Re Joseph Clayton, Ltd.*, 1920, 1 Ch. 257.

(*n*) Stat. 44 & 45 Vict. c. 41.

(*o*) The original jurisdiction of the Court of Chancery to order a sale of land appears to have been confined to cases where such a sale was necessary in order to satisfy creditors' claims enforceable against the land in that Court, or where a trust for sale of the land had been created and was exercisable: *Lechmere* v. *Brasier*, 2 J. & W. 287; *Calvert* v. *Godfrey*, 6 Beav. 97; *Carlyon* v. *Truscott*, L. R. 20 Eq. 348; *Re Staines*, 33 Ch. D. 172. Thus in suits for the administration of the estates of deceased persons the Court might order a sale of chattels real, and might, if there was jurisdiction to administer the real estate, either by reason of the same having been charged with the payment of debts or under stat. 3 & 4 Will. IV. c. 104, order a sale of real estate. The Court might also order a sale of land in a suit to enforce an equitable lien in the nature of an equitable mortgage of land, as in the case of a vendor's lien for unpaid purchase money: *Mackreth* v. *Symmons*, 15 Ves. 329; *Neate* v. *Marlborough*, 3 My. & Cr. 407, 417; *Governors of Greycoat Hospital* v. *Westminster Improvement Commrs.*, 1 De G. & J. 531; *Skene* v. *Cook*, 1902, 1 K. B. 682, 688, 689; Seton on Judgments, 1984, 7th ed. And lands forming part of the assets of a partnership firm might be ordered to be sold under the general jurisdiction of the Court to order the sale of the firm's property on a dissolution of partnership: *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Darby* v. *Darby*, 3 Drew. 495; *Taylor* v. *Neate*, 39 Ch. D. 538. The principal statutory jurisdiction of the High Court of Justice to order a sale of land is the following:—(1) That conferred

derived from the general equitable or the statutory jurisdiction of the Court of Chancery transferred by the Judicature Acts to the High Court of Justice and for the most part exercisable in the Chancery Division (*p*), or else has been expressly conferred on the High Court since the Judicature Acts, so that such orders have been made in the past either by the Court of Chancery or by the High Court acting as a Court of Equity. When such an order is made, it binds the equitable interests in the land sold of all persons, who are either parties to or bound by the proceedings in which the order is made (*q*). There is therefore no need, when land is sold in pursuance of such an order, for any such persons to join in the conveyance to the purchaser; and where there are no other equitable interests existing in the property sold, all that is necessary is that the legal estate should be duly conveyed to him (*r*). But an order for the sale of any land does not affect either the legal or the equitable interests therein of any persons who are neither parties to nor bound by the proceedings in which the order was made; so that if any such interests should be outstanding, a good title is not made (*s*). As a rule, a purchaser of land under an order

What interests are bound by an order for sale.

by sect. 25 of the Conveyancing Act, 1881 (stat. 44 & 45 Vict. c. 41), to order a sale in redemption or foreclosure actions. This was new as to redemption actions, while as to foreclosure actions it replaced and extended the jurisdiction given by sect. 48 of the Chancery Procedure Act, 1852 (stat. 15 & 16 Vict. c. 86). (2) That conferred by the Partition Acts, 1868 and 1876 (stats. 31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17). (3) That conferred by the Settled Estates Act, 1877, replacing a similar Act of 1856 (stats. 40 & 41 Vict. c. 18; 19 & 20 Vict. c. 120). (4) That conferred by the Confirmation of Sales Act, 1862 (stat. 25 & 26 Vict. c. 108). (5) That conferred by the Judgments Act, 1864, enabling the Court to order the sale of a judgment debtor's interest in land taken in execution by a judgment creditor. This superseded the former proceedings under the Judgments Act, 1838, to realise the charge given by that Act (see stats. 27 & 28 Vict. c. 112, s. 4; 1 & 2 Vict. c. 110, s. 13; Wms. Real Prop. 295, 23rd ed.). (6) That conferred by R. S. C., Nov. 1893, r. 18 (Ord. LI. r. 1B), to order a sale in debenture holders' actions: and see R. S. C. 1883, Ord. LI. r. 1, which has been held not to extend the jurisdiction of the Court so as to enable it to make an order for sale of real estate, where none could have been made before: *Re Robinson*, 31 Ch. D. 247.

(*p*) Stats. 36 & 37 Vict. c. 66, ss. 16, 34; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77; Wms. Real Prop. 177, 23rd ed.

(*q*) *Cole* v. *Sewell*, 17 Sim. 40; *Re Williams*, 5 De G. & S. 515; *Basnett* v. *Moxon*, L. R. 20 Eq. 182, 184.

(*r*) 2 Hayes's Conveyancing, 104, n.; Davidson, Prec. Conv. vol. ii. pt. i. 270, n. (*a*), 283, n. (*b*), 4th ed.; *Re Whitham*, 84 L. T. 585.

(*s*) See *Craddock* v. *Piper*, 14 Sim. 310, 312; *Govrs. of Greycoat Hospital* v. *Westminster Improvement Commrs.*, 1 De G. & J. 531; *Knight* v. *Pocock*, 24 Beav. 436; *Freeland* v. *Pearson*, L. R. 7 Eq. 246; *Jones* v. *Barnett*, 1899, 1 Ch. 611; 1900, 1 Ch. 370.

What estates the purchaser should require to be conveyed to him.

for sale made by the Court is entitled to require that the legal estate shall be duly conveyed to him (*t*): though the Court of Chancery, in the old days before power had been given by statute to dispose of estates vested in infants as trustees (*u*), would oblige a purchaser under a decree for sale of lands vested at law in an infant to accept the equitable title conferred by the order only, as the purchaser had notice from the record of the infancy, and therefore of the impossibility of conveyance before the infant attained full age (*x*). The occasion for this exception was removed by statutes of Will. IV. (*y*); and by the Trustee Acts, 1850 and 1852 (*z*), now replaced by the Trustee Act, 1893 (*a*), power was given to the Court, where a complete assurance of the whole legal estate in any lands sold under its order could not be obtained by reason of the disability of some person interested therein or for other causes, of effecting the conveyance of the legal estate by an order vesting the same in the purchaser. Since this jurisdiction was conferred, it has been the regular practice to resort thereto (*b*); and where lands have been sold under an order of the Court and any *legal* estate or interest therein cannot be well assured by the person entitled thereto, whether by reason of his disability or of the same having been limited to some unborn or unascertained person or persons, the purchaser's title will not be complete unless an order vesting the same in him has been duly obtained (*c*). As regards the assurance to the purchaser of lands sold under an order of the Court of the equitable estate therein, we have seen (*d*) that the order for sale binds the equitable interests of all persons who are parties to or otherwise bound by the pro-

(*t*) *Noel* v. *Weston*, G. Coop. 138; *Morris* v. *Clarkson*, 3 Swanst. 558, 564; Sug. V. & P. 397, 398; *Freeland* v. *Pearson*, L. R. 7 Eq. 246.

(*u*) See stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 11; Sug. V. & P. 397, 398.

(*x*) *Waltham's case*, cited G. Coop. 139, Sug. V. & P. 397; *Morris* v. *Clarkson*, 3 Swanst. 558.

(*y*) Stats. 11 Geo. IV. & 1 Will. IV. c. 47, s. 11, and c. 60, s. 7.

(*z*) Stats. 13 & 14 Vict. c. 60, s. 29; 15 & 16 Vict. c. 55, s. 1.

(*a*) Stat. 56 & 57 Vict. c. 53, s. 30; see also sects. 26-29, 31-33, 50; and see as to the orders made and practice thereunder, 2 Seton on Judgments, 1221 *sq.*, 7th ed.

(*b*) 2 Dart, V. & P. 1220, and n. (*q*), 5th ed.; 1347, and n. (*k*), 6th ed.; 1184, and n. (*s*), 7th ed.

(*c*) See *Wake* v. *Wake*, 17 Jur. 545; *Wood* v. *Beetlestone*, 1 K. & J. 213; *Lees* v. *Coulton*, L. R. 20 Eq. 20; *Basnett* v. *Moxon*, ib. 182; Seton on Judgments, 1221, 1222, 7th ed.

(*d*) Above, p. 449.

ceedings in which the order was made, and there is no need for any other assurance of such interests to be made. So that where any *equitable* estate has been limited to any unborn or unascertained person, there is no occasion to obtain an order expressly vesting the same in the purchaser; the order for sale is sufficient for this purpose.

The order should have been rightly made—

But in order to bind the equitable interests of persons intended to be bound by the proceedings, it was formerly necessary that the order for sale should be *duly* made, that is, made on a right exercise of some jurisdiction in that behalf (*e*) vested in the Court; and if this were not the case, the Court would not oblige the purchaser, if he took the objection, to accept the title, and if he did accept the title, it appears that he would not have been protected by the order (*f*). And the same result would follow, if the sale were not properly carried out according to the order, although the order itself were valid (*g*). Other irregularities in the proceedings, in which the order for sale was made, would not, as a rule, affect a purchaser under the order (*h*). But, as the order did not affect the interests, whether legal or equitable, of any persons who were neither parties to nor otherwise bound by the proceedings, it was always necessary for the purchaser to see that all persons interested in the property sold were so bound, or else that he would obtain an express conveyance from them of their respective interests (*i*). By the Conveyancing Act, 1881 (*k*), an order of the Court

And the sale properly carried out.

(*e*) Above, p. 448, n. (*o*).

(*f*) *Lechmere* v. *Brasier*, 2 J. & W. 287; *Blacklow* v. *Laws*, 2 Hare, 40; *Calvert* v. *Godfrey*, 6 Beav. 97; 2 Dart, V. & P. 1224, 5th ed.; 1351, 6th ed.; 1186, 7th ed.

(*g*) *Colclough* v. *Sterum*, 3 Bligh, 181; *Powell* v. *Powell*, L. R. 10 Ch. 130.

(*h*) See *Lutwych* v. *Winford*, 2 Bro. C. C. 248; *Lloyd* v. *Johnes*, 9 Ves. 37, 65; *Curtis* v. *Price*, 12 Ves. 89; *Bowen* v. *Evans*, 2 H. L. C. 257; *Beioley* v. *Carter*, L. R. 4 Ch. 230, 238; Sug. V. & P. 110; 2 Dart, V. & P. 1223-1225, 5th ed.; 1350-1352, 6th ed.; 1185-1187, 7th ed.

(*i*) *Colclough* v. *Sterum*, 3 Bligh, 181, 186; *Beioley* v. *Carter*, L. R. 4 Ch. 230, 238; Sug. V. & P. 111; 2 Dart, V. & P. 1225, 5th ed.; 1352, 6th ed.; 1187, 7th ed.; and see above, p. 449, and note (*s*).

(*k*) Stat. 44 & 45 Vict. c. 41, s. 70, sub-s. 1, extending by sub-s. 3 to past as well as future orders, except those which had been already held to be invalid, or to invalidate which proceedings were pending; and declared by sub-s. 2 to have effect as to leases, sales or other acts authorised by the Court under the Settled Estates Act, 1877, or the Act of 1856, notwithstanding the exceptions therein mentioned: see stats. 19 & 20 Vict. c. 120, s. 28; 40 & 41 Vict. c. 18, s. 40.

Order of the Court not to be invalidated for want of jurisdiction.

under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction, or want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not. The *dicta*, if not the decisions, upon the construction of this enactment have been somewhat conflicting (*l*); and it is not easy to state its precise effect. But it is to be observed that it purports to cure one defect of title only, the invalidity of an order of the Court, whether for sale or otherwise; and that it does not appear to extend the effect of a valid order so as to bind any persons whose interests would not otherwise have been affected thereby (*m*). The enactment appears to protect purchasers from disturbance by persons who might otherwise have ejected them or recovered against them on the ground that an order of the Court forming part of their title was invalid for want of jurisdiction or for any other cause therein mentioned. And it has been held that purchasers of land under an order for sale made by the Court are no longer at liberty to object to the title on the ground that the order is invalid for any of such causes (*n*). But the enactment does not protect a purchaser from disturbance by persons whose rights or interests were never intended to be affected by the order; it has not the effect of conferring on a purchaser under an order for sale a good title as against all the world (*o*). And where the order, being valid, is not properly carried out, the enactment does not appear to have any application. The duties of the conveyancer advising a purchaser of land, to which the title depends upon an order for sale made by the Court, remain, therefore, as above stated (*p*).

§ 10.—*Sale of an equity of redemption.*

Risks incurred on purchase of an equity of redemption.

The purchaser of an equity of redemption is exposed to the following risks:—First, since equitable charges or rights affecting equitable estates in land rank, as a rule, according to the

(*l*) See *Re Hall Dare's Contract*, 21 Ch. D. 41; *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376; *Jones* v. *Barnett*, 1899, 1 Ch. 611; 1900, 1 Ch. 370; *Re Whitham*, 84 L. T. 585.

(*m*) It is submitted that any *dicta* to the contrary effect in *Mostyn* v. *Mostyn* (ubi sup.) are erroneous; see *Jones* v. *Barnett*, ubi sup.

(*n*) *Re Hall Dare's Contract*, 21 Ch. D. 41.

(*o*) *Jones* v. *Barnett*, 1899, 1 Ch. 611; 1900, 1 Ch. 370.

(*p*) Pp. 447, 448.

order of the times at which they were created (*q*), he takes subject to all equities affecting the land purchased in the hands of the vendor at the time of sale, whether he have notice of any such equities or not. He buys, therefore, subject to all prior equitable mortgages of the land, whether made in favour of the legal mortgagee on further advances or of any other person (*r*), to any right of consolidation of securities which the mortgagee may have already acquired (*s*), and to all other equities affecting the premises, such as any equitable right to set aside the conveyance to the vendor (*t*), or any claims on the premises arising from any trust to which the same may have been subject in the vendor's hands (*u*). And after completion of the contract by conveyance and payment of the purchase money, he remains subject to such of these prior equities as amount to an *interest* in the land, in distinction to a bare right of suit (*x*). Secondly, in consequence of the doctrine of tacking equitable charges to the legal estate, the purchaser of an equity of redemption incurs the danger of being excluded by or postponed to equitable charges on the land made subsequently to the sale.

Existence of prior equities.

Through tacking.

(*q*) *Jones* v. *Jones,* 8 Sim. 633; *Wilmot* v. *Pike,* 5 Hare, 14; *Phillips* v. *Phillips,* 4 De G., F. & J. 208, 215; *Taylor* v. *London and County Bank,* 1901, 2 Ch. 231, 260; *Perham* v. *Kempster,* 1907, 1 Ch. 373, 379; *Cloutte* v. *Storey,* 1911, 1 Ch. 18, 24, 30-32. Chattels real are real estate for the purposes of this rule; *Taylor* v. *London and County Bank,* 1901, 2 Ch. 231, 255.

(*r*) See previous note, and *Bailey* v. *Richardson,* 9 Hare, 734; *Taylor* v. *Russell,* 1892, A. C. 244, where the prior equitable mortgage was only excluded by tacking.

(*s*) See *White* v. *Hillacre,* 3 Y. & C. Ex. 597, 608, 609; *Jennings* v. *Jordan,* 6 App. Cas. 698; *Harter* v. *Colman,* 19 Ch. D. 630; *Minter* v. *Carr,* 1894, 3 Ch. 498. These cases establish that, if no right of consolidation should have been acquired prior to the sale of the equity of redemption, it cannot afterwards arise by reason of the mortgage and some security on other property of the mortgagor becoming subsequently vested in the same person, and absolute at law. But if a man buy from the same mortgagor, and at the same time, the equity of redemption of several properties subject to different mortgages, he takes them subject to any right of consolidation which may subsequently arise: *Vint* v. *Padget,* 2 De G. & J. 611; *Pledge* v. *White,* 1896, A. C. 187; and see Wms. Real Prop. 633-635, 23rd ed.

(*t*) See *Bailey* v. *Barnes,* 1894, 1 Ch. 25, where the prior equitable right was only defeated by tacking.

(*u*) See *Bates* v. *Johnson,* Joh. 304, where the claim of the *cestui que trust* was only defeated by tacking: *Cave* v. *Cave,* 15 Ch. D. 639; *Taylor* v. *London and County Bank,* 1901, 2 Ch. 231.

(*x*) See *Cave* v. *Cave,* 15 Ch. D. 639, 645-649. To a bare right of suit in equity, such as a claim to set aside a conveyance for fraud, he could, after payment of the price, plead purchase for value without notice of the equity; see *S. C.;* below, Chap. XIII. § 1· Chap. XIV. § 1.

Thus, if the legal mortgagee were to make further advances to the vendor after the sale, but whilst the vendor remained in possession or otherwise in apparent ownership of the land, and without having received notice of the sale, he would be entitled to tack all that might become due in respect of such advances to his original charge (*y*). And any other person who should make advances to the vendor on the security of the land after the sale and in the same circumstances, might, if he could obtain a transfer of the legal mortgage, tack what should be due under such subsequent advances to the original mortgage debt (*z*).

Inquiries to be made of the mortgagee by purchaser of an equity of redemption.

The purchaser of an equity of redemption may guard against some of these risks, but against others he has no protection. Thus he may, and of course he always should inquire of the mortgagee, first, as to the state of the mortgage debt and what is owing thereon; secondly, whether the mortgagee has already made any further advances to the mortgagor on the security of the land purchased; and thirdly, whether the mortgagee has vested in himself any other mortgages or charges which affect any other property of the mortgagor and which he is entitled to consolidate with his mortgage on the purchased land. And the purchaser should give formal notice to the mortgagee of his contract for purchase. It is true that the mortgagee is not bound to answer such inquiries unless an offer to redeem his charge is made (*a*). And if the mortgagee should decline to answer these inquiries, the purchaser cannot safely proceed with the contract, and would, it is submitted, be entitled to repudiate the same on the ground that the vendor has failed to prove, by the only evidence that can possibly be accepted, facts material to the title. But if the mortgagee do answer such inquiries precisely, after being informed of the purpose with which they are made, he will be estopped from denying the truth of his answers, and so cannot afterwards assert his own charges or

Notice to mortgagee.

(*y*) *Jones* v. *Powles*, 3 My. & K. 581; Sug. V. & P. 196; *Young* v. *Young*, L. R. 3 Eq. 801.

(*z*) *Frere* v. *Moore*, 8 Price, 475, 488, 489; *Jones* v. *Powles*, 3 My. & K. 581, 596, 598; *Bates* v. *Johnson*, Joh. 304; *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 36, 37. But a person entitled to a charge on the purchase money to be paid under a contract for the sale of an equity of redemption, could not tack this charge to the legal mortgage: *Lacey* v. *Ingle*, 2 Ph. 413.

(*a*) *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377, 390; *Low* v. *Bouverie*, 1891, 3 Ch. 82.

interests upon the property so as to defeat or postpone the purchaser's interest acquired on the faith of the representations so made (*b*). And notice to the mortgagee of the sale of the equity of redemption will of course prevent him from tacking any subsequent advances to his legal security (*c*). But the purchaser of an equity of redemption in land cannot protect himself against equitable rights, which are prior to his own and are either unknown to or suppressed by the vendor, by any notices or inquiries. Notice of his purchase to the mortgagee seised of the legal estate can give him no priority over equitable incumbrancers already existing (*d*), and will not prevent a subsequent equitable incumbrancer from excluding him by tacking, if the subsequent incumbrancer should procure a transfer of the legal mortgage (*e*). The purchaser of an equity of redemption should inquire of the vendor whether he has created or is aware of any equitable charge, incumbrance or right which affects the property sold and is not disclosed by the abstract (*f*); and it is submitted that, as the purchaser is to acquire no legal estate which would protect him against unknown equities, this question is relevant to the title offered by the vendor, and the vendor cannot vouch the rule in *Re Ford and Hill* (*g*) as an excuse for refusing to answer (*h*). The purchaser should also inquire of the legal mortgagee whether he has had notice or is aware of any such equitable charge, incumbrance or right. But if these inquiries fail to inform the purchaser of some existing equitable incumbrance, and he only discover the same after payment of his purchase money, he will have no remedy but to procure, if he can, a transfer of the legal mortgage, and so forestall the other incumbrancer in using the resource of tacking. If he can accomplish this, he will be entitled to hold the land free from the claims of all persons entitled thereto or interested therein under any equitable rights of which he had

Inquiries to be made of the vendor.

Further inquiry of the mortgagee.

Purchaser's right of tacking.

(*b*) *Ibbottson* v. *Rhodes*, 2 Vern. 554; *Stronge* v. *Hawkes*, 4 De G. M. & G. 186, 196; *Low* v. *Bouverie*, 1891, 3 Ch. 82.

(*c*) *Le Neve* v. *Le Neve*, Amb. 436, 446; *Birch* v. *Ellames*, 2 Anst. 427; see also *Hopkinson* v. *Rolt*, 9 H. L. C. 514; *Menzies* v. *Lightfoot*, L. R. 11 Eq. 459; *London and County Bank* v. *Ratcliffe*, 6 App. Cas. 722; *West* v. *Williams*, 1899, 1 Ch. 132.

(*d*) Above, p. 453, nn. (*q*), (*r*); *Rooper* v. *Harrison*, 2 K. & J. 86; *Phipps* v. *Lovegrove*, L. R. 16 Eq. 80, 91; *Re Richards*, 45 Ch. D. 589; *Hopkins* v. *Hemsworth*, 1898, 2 Ch. 347.

(*e*) *Peacock* v. *Burt*, 4 L. J. (N. S.) Ch. 33.

(*f*) *Perham* v. *Kempster*, 1907, 1 Ch. 373, 381.

(*g*) 10 Ch. D. 365.

(*h*) See above, pp. 123, n. (*n*), 168.

no notice at the time when he paid his purchase money; and any subsequent notice of any such right will be immaterial (*i*): but he cannot so avoid any equities of which he *had* notice, either actual or constructive (*k*), before he actually paid the price agreed upon for the land (*l*). If, therefore, he receive notice of any such equities after the contract for sale, but before completion, of course he cannot safely proceed with the purchase unless the equities are released or the persons entitled thereunder concur in the conveyance to him (*m*).

Equities of redemption of lands in Yorkshire.

In dealing with equities of redemption of lands in Yorkshire, it must be borne in mind that the doctrine of the protection afforded by the acquisition of the legal estate, whether taken for tacking or other purposes, by a purchaser for value without notice of some previously created equitable interest, was abolished by the Yorkshire Registries Act, 1884, with respect to lands in that county and so far as that doctrine might otherwise have afforded protection against prior *registered* assurances creating some equitable estate or interest (*n*).

Purchaser of equity of redemption paying off the first mortgage—

It has been held that if the purchaser of an equity of redemption pay off the first mortgage when he has notice of an intermediate charge, the first mortgage is extinguished and the intermediate incumbrancer is entitled to enforce his security as the first charge on the land without redeeming the mortgage so paid off (*o*). This doctrine has been frequently mentioned

(*i*) See the cases cited above, pp. 453, 454, and notes. But where the legal estate is held on an express trust for the prior incumbrancer, the purchaser cannot obtain any advantage by getting in the same after he has had notice of the prior incumbrance: *Saunders* v. *Dehew*, 2 Vern. 271; *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556; *Harpham* v. *Shacklock*, 19 Ch. D. 207; *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231, 256, 257.

(*k*) *Le Neve* v. *Le Neve*, Amb. 436, 446; *Birch* v. *Ellames*, 2 Anst. 427; *Potter* v. *Sanders*, 6 Hare, 1; *Bailey* v. *Richardson*, 9 Hare, 734.

(*l*) *Tourville* v. *Naish*, 3 P. W. 306; *Story* v. *Windsor*, 2 Atk. 630; *Hardingham* v. *Nicholls*, 3 Atk. 304; *Maundrell* v. *Maundrell*, 10 Ves. 246, 271; *Taylor* v. *Baker*, 5 Price, 306; *Rayne* v. *Baker*, 1 Giff. 241.

(*m*) Above, pp. 158, 225.

(*n*) Stat. 47 & 48 Vict. c. 54, ss. 14, 16, save as against equitable estates or interests so created which existed prior to the commencement of that Act (1st Jan. 1885); see *Manks* v. *Whiteley*, 1911, 2 Ch. 448, reversed, 1912, 1 Ch. 735, restored on different grounds, *nom. Whiteley* v. *Delaney*, 1914, A. C. 132; Wms. Real Prop. 629-632, 23rd ed.

(*o*) *Toulmin* v. *Steere*, 3 Mer. 210.

with disapproval, though never precisely overruled (*p*). It has however been established that if, when the first mortgage is so got in, an intention be shown to keep the charge on foot, the purchaser will be entitled to the benefit thereof, and the intermediate incumbrancer cannot then enforce his security without redeeming the charge. And it is not necessary for this purpose that the mortgage should be transferred to a trustee for the purchaser; it will not merge if the intention to keep it alive appear either by express declaration or by inference from the surrounding circumstances, notwithstanding that the mortgage and the equity of redemption be both vested in the same person (*q*).

Keeping the charge on foot.

If the mortgagee under a legal mortgage of land purchase the equity of redemption, he will be entitled, under the doctrine of tacking, to hold the land free from all intermediate equitable incumbrances of which he had no notice at the time when he paid his purchase money (*r*). But with regard to mesne incumbrances of which he had notice and which were not discharged, it was formerly considered that, unless his mortgage were transferred to a trustee for himself for the purpose of keeping it alive, it merged in his ownership of the premises, with the consequence that the mesne incumbrances became first charges thereon, and the incumbrancers could enforce their

Purchase by mortgagee of the equity of redemption.

(*p*) See *Watts* v. *Symes*, 1 De G., M. & G. 240, 244; *Adams* v. *Angell*, 5 Ch. D. 634, 641, 645, 647; *Thorne* v. *Cann*, 1895, A. C. 11, 16-18; *Liquidation Estates Purchase Co.* v. *Willoughby*, 1896, 1 Ch. 726; 1898, A. C. 321; *Manks* v. *Whiteley*, 1911, 2 Ch. 448, reversed, 1912, 1 Ch. 735, restored on different grounds, *nom. Whiteley* v. *Delaney*, 1914, A. C. 132.

(*q*) See cases cited in preceding note; and *Bailey* v. *Richardson*, 9 Hare, 734; *Phillips* v. *Gutteridge*, 4 De G. & J. 531; *Hayden* v. *Kirkpatrick*, 34 Beav. 645; *Re Pride*, 1891, 2 Ch. 135. Of course, a mortgagor paying off a first mortgage created by himself cannot by any means set up the charge to defeat or hinder his own subsequent incumbrancers: *Watts* v. *Symes*, 1 De G., M. & G. 240, 244; *Grierson* v. *National Provincial Bank of England, Ltd.*, 1913, 2 Ch. 18, 24. Neither can he defeat his own subsequent incumbrancers by purchasing the property at a sale thereof under a power of sale given by such first mortgage: *Otter* v. *Vaux*, 2 K. & J. 650, 6 De G., M. & G. 638. But if a man become entitled to an equity of redemption by descent or devise, he may keep alive for his own benefit any charge made by his predecessor which he chooses to pay off: *Davis* v. *Barrett*, 14 Beav. 542; or if he be himself the mortgagee under any such previous charge, the same will not merge if such be not his intention: *Forbes* v. *Moffatt*, 18 Ves. 384.

(*r*) Above, pp. 453, 456, and notes.

securities without redeeming the legal mortgage (*s*). But it is now established in this case, as well as that of the redemption of a first mortgage by the purchaser of an equity of redemption, that if an intention to keep the mortgage on foot be shown, either by express declaration or by implication from the surrounding circumstances, the mortgagee purchasing the equity of redemption may avail himself of the charge as a protection against mesne incumbrancers, of whose claims he had notice, notwithstanding that the first mortgage, as well as the equity of redemption, be vested in himself alone; and when such an intention is shown the mesne incumbrancers must redeem the first mortgage if they wish to enforce their securities (*t*). Both a mortgagee purchasing the equity of redemption, and the purchaser of an equity of redemption redeeming the mortgage, should be careful to take a conveyance in such form that there can be no doubt whether it is intended to keep the charge alive or not (*u*). A charge so kept on foot remains the personal estate of the party, for whose benefit it is preserved: but it may subsequently be merged by any assurance of the land which would make it a fraud to keep the charge alive (*v*).

Marshalling securities.

In connexion with the sale of an equity of redemption, it may be useful to mention the rules as to marshalling securities. Where two properties belonging to the same owner have been mortgaged by him to the same mortgagee or are otherwise subject to some paramount charge affecting both of them (*x*), and he has subsequently assigned over one of them for valuable consideration, whether on sale, mortgage, or settlement (*y*), then

(*s*) 2 Dart, V. & P. 917, 5th ed.; 1040, 6th ed.; 952, 7th ed.; *Toulmin* v. *Steere*, 3 Mer. 210, 224.

(*t*) *Adams* v. *Angell*, 5 Ch. D. 634; above, p. 457, note (*q*).

(*u*) See *Adams* v. *Angell*, ubi sup.; Davidson, Prec. Conv. vol. ii. pt. i. 324, n., 327, n., 4th ed.; Davidson's Concise Precedents, 157, 19th ed.; 1 Key & Elph. Prec. Conv. 490, 531, and notes, 4th ed.; 571, 609, and notes, 10th ed. If this had been done in *Whiteley* v. *Delaney*, 1914, A. C. 132, the questions there litigated would never have arisen.

(*v*) *Re Gibbon*, 1909, 1 Ch. 367; above, p. 415.

(*x*) See *Webb* v. *Smith*, 30 Ch. D. 192, 200, 202; *The Chioggia*, 1898, P. 1, 6. Marshalling is also permitted where several properties have by consolidation of mortgages become subject to the entire claim of one mortgagee; above, p. 453, and note (*s*); where properties belonging to different owners are pledged for the same debt; *Going* v. *Farrell*, Beatt. 472; and in favour of a surety; *Heyman* v. *Dubois*, L. R. 13 Eq. 158.

(*y*) Marshalling has been allowed in favour of the grantees under a voluntary settlement containing covenants that the land settled should remain to the uses assured, and for quiet enjoyment; *Hales* v. *Cox*,

if the paramount incumbrancer satisfy his security out of the property so assigned (*z*), the assignee is entitled in equity, as against the owner, the trustee in his bankruptcy (*a*), and his representatives taking by succession after his death, and subject to any agreement to the contrary (*b*), to have the securities marshalled, that is, to stand in the place of the paramount incumbrancer with regard to the other property to the extent of the value of the property taken (*c*) to satisfy the paramount charge. The assignee is in fact entitled, in equity, as against the owner, his trustee in bankruptcy, heirs, executors, administrators and devisees, and in default of agreement to the contrary, to have the property so assigned to him exonerated from the charge (*d*). This equity is however enforced only against the persons above specified and not against any assignees by act *inter vivos*, whether taking for value or gratuitously, of the other property (*e*). If therefore in the case put the owner assign to different persons both of the properties subject to the paramount charge, the assignee who is prior in time will lose the right, which but for the subsequent assignment he would have enjoyed, to have the property assigned to him entirely exonerated from the charge. But he will not be deprived of all right of marshalling; for if the paramount incumbrancer exhaust that property, he will still have the right to have the securities marshalled by apportioning the paramount charge on both properties rateably according to their respective values, and

Marshalling where two properties subject to a paramount charge have both been assigned over.

32 Beav. 118: but not where there was a covenant for further assurance only; *Ker* v. *Ker*, I. R. 4 Eq. 15; *Re Jones*, 1893, 2 Ch. 461, 473, 474.

(*z*) The paramount incumbrancer is entitled to satisfy his security out of whichever property he may choose first to resort to, and the Court will not interfere with the exercise of this right; *Wallis* v. *Woodyear*, 2 Jur. N. S. 179; *Manks* v. *Whiteley*, 1911, 2 Ch. 448, 466 (this point was not questioned in the subsequent progress of that case, 1912, 1 Ch. 735, and 1914, A. C. 132).

(*a*) See *Expte. Hartley*, 1 Deac. 288; *Baldwin* v. *Belcher*, 3 Dru. & War. 173, 176; *Gibson* v. *Seagrim*, 20 Beav. 614; *Heyman* v. *Dubois*, L. R. 13 Eq. 158.

(*b*) See *Re Mower's Trusts*, L. R. 8 Eq. 110.

(*c*) See *Craddock* v. *Piper*, 15 Sim. 301, 302.

(*d*) Hardwicke, C., *Lanoy* v. *Athol*, 2 Atk. 444, 446; Eldon, C., *Aldrich* v. *Cooper*, 8 Ves. 382, 395; *Averall* v. *Wade*, Ll. & G. t. Sugd. 252, 259; *Hughes* v. *Williams*, 3 Mac. & G. 683, 690, 691; *Handcock* v. *Handcock*, 1 Ir. Ch. 444, 474; *Tidd* v. *Lister*, 10 Hare, 140, 157, 3 De G., M. & G. 857, 872; *Gibson* v. *Seagrim*, 20 Beav. 614; Kay, L. J., *Flint* v. *Howard*, 1893, 2 Ch. 54, 72; *Re Jones*, 1893, 2 Ch. 461, 470 *sq.*

(*e*) See *Dolphin* v. *Aylward*, L. R. 4 H. L. 486, 501; *Flint* v. *Howard*, 1893, 2 Ch. 54, 61, 72, 73.

standing in the paramount incumbrancer's place as against the other property in respect of that proportion of the paramount charge which according to such apportionment it ought to bear (*f*), and to the extent of the property, which according to such apportionment was that assigned to him; that is to say, up to the value of the property exhausted after deducting its due proportion of the paramount charge (*g*). Thus if Blackacre, worth 2,000*l*., and Whiteacre, worth 1,000*l*., belonging to A. be mortgaged to B. for 2,100*l*., and then Blackacre be mortgaged to C. for 900*l*., and B. sell Blackacre for 2,000*l*. and so repay himself to that extent, C. is entitled to stand in B.'s place as against Whiteacre; and if Whiteacre should sell for 1,000*l*., C. would be entitled to the balance after satisfying the remainder of B.'s charge. But if before the sale of Blackacre A. had sold Whiteacre to D., then in adjusting the equities between C. and D. after the sale of Blackacre, the paramount charge of 2,100*l*. would have to be apportioned between Black-

(*f*) *Barnes* v. *Racster*, 1 Y. & C. C. C. 401, 402, 408, 410; *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377, 387, 398; *Stronge* v. *Hawkes*, 4 De G. & J. 632, 641, 651-653; *Wellesley* v. *Mornington*, 17 W. R. 355; *Moxon* v. *Berkeley, &c. Bdg. Socy.*, 59 L. J. Ch. 524, 526; *Flint* v. *Howard*, 1893, 2 Ch. 54, 62; *Wood* v. *West*, 40 Sol. J. 114; *Baglioni* v. *Cavalli*, 49 W. R. 236.

(*g*) See note (*c*) to p. 459, above. It appears from the cases cited in the previous note that, for the purpose of assessing the proportions of the first or paramount charge which ought in the above case to be borne by the several properties subject thereto, the values of such properties will be taken as ascertained by the sales thereof made in consequence of the realisation of that charge. It does not appear, however, that in any of these cases the question was raised or argued, what is on principle the right time for ascertaining such values. This is the more remarkable that in *Flint* v. *Howard*, ubi sup., one of the properties mortgaged was a reversionary interest in personalty, the value of which was continually increasing. Where a charge on several properties is created by the act of a single owner thereof and the properties pass on his death, either under his will or by the law of succession on intestacy, to different persons subject to the charge, the rule is established that, for the purpose of duly apportioning the charge between the several properties affected, their values are to be ascertained as they were at the date of the death, and not at the time when the charge was created or when it was actually realised; see *Long* v. *Short*, 1 P. W. 403, n. (1); *Gale* v. *Fenwick*, 43 L. J. Ch. 178; *Leonino* v. *Leonino*, 10 Ch. D. 460; *Re Athill*, 16 Ch. D. 211; *Re Price*, 31 Ch. D. 485, 493; and consider *Fielding* v. *Preston*, 1 De G. & J. 438, 445, where several properties were devised subject to one charge, and the equity to apportion arose by the testator's own act under his will, though it did not actually come into effect until after the death of a tenant for life. These authorities suggest that, on principle, the right time for ascertaining the respective values of properties on which the securities ought to be apportioned is the time when the equity to apportion first arises and not the time when it is actually asserted.

acre and Whiteacre according to their values, 1,400*l.* being attributed to Blackacre and 700*l.* to Whiteacre, and C. would only be entitled to stand in B.'s place as regards Whiteacre in respect of the 700*l.* so apportioned. Out of this sum B. would first take his remaining 100*l.*, then C. would have 600*l.* and subject thereto Whiteacre or the proceeds of sale thereof would belong to D. (*h*). And the same law would apply if A. had mortgaged, not sold, Whiteacre to D., subject to the first mortgage and subsequently to the second mortgage of Blackacre (*i*). It does not appear that in these cases the rights of the assignees are altered by the circumstance that the second assignee took with notice, either express or implied, of the first assignment (*j*): but the second assignment may of course be made on the terms that the assignee shall take subject to the satisfaction or full enforcement of the first assignee's right to have the property assigned to him entirely exonerated from the paramount charge, and if so, the second assignee's rights will be determined by such agreement (*k*). It seems, however, that if the paramount charge were a legal mortgage and either assignee should get it in, the parties' rights might be varied by the doctrine of tacking (*l*). Thus in the example given, if D. had purchased Whiteacre without notice of C.'s charge on Blackacre, and had afterwards taken a transfer of B.'s mortgage, D. might sell Blackacre in satisfaction, so far as it would extend, of that mortgage, and then tack his interest in Whiteacre to B.'s charge thereon and so exclude any equity of C. against Whiteacre. Or if C. had first obtained a transfer of B.'s mortgage, he might have sold Whiteacre to satisfy that mortgage *pro tanto* (*m*) and then tacked his own charge on Blackacre thereto (*n*). Tacking.

(*h*) See cases cited in the last note but one.

(*i*) See *Barnes* v. *Racster*, *Flint* v. *Howard*, ubi sup.

(*j*) See Kay, L. J., *Flint* v. *Howard*, 1893, 2 Ch. 54, 73, and other cases cited in note (*f*), p. 460, above. It is thought that these authorities have overruled the doctrine laid down in *Hamilton* v. *Royse*, 2 Sch. & Lef. 315, 327-329, and *Aicken* v. *Macklin*, 1 Dru. & Walsh, 621, 634, 635, that, where the second assignee takes with notice of the first assignment, or subject generally to all equities previously created, he takes subject to the first assignee's original equity to marshal. It is thought that the propositions stated in Dart, V. & P. 914, 5th ed. (1035, 6th ed., and still retained, 947, 7th ed.), in reliance on these cases cannot now be maintained.

(*k*) See *Re Mower's Trusts*, L. R. 8 Eq. 110.

(*l*) Above, pp. 453, 455, 456.

(*m*) See note (*z*) to p. 459, above.

(*n*) *Titley* v. *Davies*, 2 Eq. Ca. Abr. 604, pl. 35, 36, 2 Y. & C. C. C.

Interest now chargeable on a mortgage.

Since the repeal of the Usury Laws (*o*), any rate of interest that the parties may agree to may be taken on a mortgage debt and secured on the mortgaged property; a commission stipulated for by the mortgagee and deducted from the loan will, in the absence of any fraud or undue influence, be allowed in taking the accounts (*p*); and agreements for charging compound interest, or capitalising interest which may fall into arrear, are no longer invalid (*q*). The Court however strenuously upholds the rule that no stipulation forming part of a contract or transaction of mortgage, that the security shall not be redeemable according to the rules of equity, shall have any effect in equity (*r*). But although any agreement, which actually fetters the equity of redemption with some other condition than the payment of the principal, interest and costs due under the mortgage, is invalid (*s*), it has been established that

Mortgage cannot be made irredeemable.

Equity of redemption not to be clogged.

383, n., 393-395; *Sober* v. *Kemp*, 6 Hare, 155; *Liverpool Marine Credit Co.* v. *Wilson*, L. R. 7 Ch. 507, 512; *Flint* v. *Howard*, 1893, 2 Ch. 54, 68, 69; Dart, V. & P. 914, 915, 5th ed.; 1036, 6th ed.; 947, 948, 7th ed.

(*o*) By stat. 17 & 18 Vict. c. 90; see Wms. Real Prop. 598, n. (*e*), 23rd ed.

(*p*) *Mainland* v. *Upjohn*, 41 Ch. D. 126. As to undue influence, see below, Chap. XIV. § 2.

(*q*) *Clarkson* v. *Henderson*, 14 Ch. D. 348; Davidson, Prec. Conv. vol. ii. pt. ii. p. 360, n., 4th ed.; *Mainland* v. *Upjohn*, 41 Ch. D. 126, 136, 142, 143; *Wrigley* v. *Gill*, 1906, 1 Ch. 165; *Re Craven's Mortgage*, 1907, 2 Ch. 448; *Re Morris*, 1922, 1 Ch. 126. In the absence of agreement to the contrary, simple interest only is chargeable in respect of a mortgage debt carrying interest; *Daniell* v. *Sinclair*, 6 App. Cas. 181; *Ainsworth* v. *Wilding*, 1905, 1 Ch. 435.

(*r*) *Price* v. *Perrie*, 2 Freem. 258; *Salt* v. *Northampton*, 1892, A. C. 1; *Fairclough* v. *Swan Brewery Co., Ltd.*, 1912, A. C. 565, 570. Thus a stipulation in the mortgage contract that the mortgagee shall or may purchase the mortgaged property is void; *Samuel* v. *Jarrah, &c. Corpn.*, 1904, A. C. 323. But the mortgagee may by an agreement made subsequently to the mortgage purchase the equity of redemption; *Reeve* v. *Lisle*, 1902, A. C. 641; above, pp. 457, 458.

(*s*) *Jennings* v. *Ward*, 2 Vern. 520; *James* v. *Kerr*, 40 Ch. D. 449, 459 (agreement for subsequent payment of a bonus to the mortgagee held void); *Field* v. *Hopkins*, 44 Ch. D. 524 (agreement for adding to the security a solicitor-mortgagee's profit costs held void; since allowed by stat. 58 & 59 Vict. c. 25); *Noakes & Co., Ltd.* v. *Rice*, 1902, A. C. 24 (covenant on mortgage of a leasehold public-house to take beer *during the term* from the mortgagee only held not to bind the mortgagor after redemption); *Bradley* v. *Carritt*, 1903, A. C. 253 (agreement on mortgage of shares in a tea company that the mortgagee should have the sale of all the company's teas as broker held no longer binding after redemption); *British South Africa Co.* v. *De Beers, &c. Ltd.*, 1910, 1 Ch. 354, 2 Ch. 502 (agreement to grant an exclusive licence to the mortgagee to work certain diamondiferous ground held void as a fetter on the equity of redemption), reversed on the construction of the agreement, 1912, A. C. 52; *Morgan* v. *Jeffreys*, 1910, 1 Ch. 620

there is now no rule in equity that a mortgagee cannot stipulate in the mortgage deed for a collateral advantage to endure beyond redemption, provided that such collateral advantage be not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with the contractual or equitable right to redeem (*t*).

Mortgages to money-lenders.

It may be mentioned here that, under the Moneylenders Act, 1900 (*u*), a mortgage of land to a moneylender (*v*) is void, if not made to him in his registered name (*x*), or if in other respects the transaction were not carried out in conformity with the requirements of the Act (*y*). This Act made all such mort-

(stipulation that the mortgage should not be paid off for twenty-eight years without the consent of the mortgagee held void); *Fairclough* v. *Swan Brewery Co., Ltd.*, 1912, A. C. 565 (proviso in a mortgage of a lease for twenty years precluding the mortgagor from paying off the principal sum advanced without the express consent of the mortgagee, except by the monthly instalments specified (by which the mortgage money would not be wholly discharged until six weeks before the expiration of the lease), held void). See above, p. 115, n. (*e*); and cf. *Biggs* v. *Hoddinott*, 1898, 2 Ch. 307 (where on a mortgage of an hotel to a brewer covenants to take beer from the mortgagee only *during the continuance of the security* and for the continuance of the loan for five years were upheld); *Santley* v. *Wilde*, 1899, 2 Ch. 474 (where an agreement to pay to the mortgagee of a leasehold theatre one-third of the profit rental thereof *during the term* was held valid by the C. A.). The latter decision was however criticised adversely in *Noakes & Co., Ltd.* v. *Rice*, 1902, A. C. 24, 28, 31, 32, 34; and *Bradley* v. *Carritt*, 1903, A. C. 253, 255 *sq.* But it appears that all these cases ought now to be judged by the principles laid down as stated above in *Kreglinger* v. *New Patagonian Meat, &c. Co.*, 1914, A. C. 25; see next note.

(*t*) *Kreglinger* v. *New Patagonian Meat, &c. Co., Ltd.*, 1914, A. C. 25 (floating charge by a company containing a stipulation that for five years from the date thereof the company should not sell sheepskins to any other person than the mortgagees so long as the latter were willing to buy at the best price offered by any other person, and that the company should pay to the mortgagees a commission on all sheepskins sold by the company to any other person; which stipulation was held to be valid and enforceable after the mortgage had been paid off).

(*u*) Stat. 63 & 64 Vict. c. 51, s. 2 (1).

(*v*) See sect. 6; *Sadler* v. *Whiteman*, 1910, 1 K. B. 868, reversed, 1910, A. C. 514.

(*x*) *Chapman* v. *Michaelson*, 1908, 2 Ch. 612; 1909, 1 Ch. 238; see also *Bonnard* v. *Dott*, 1906, 1 Ch. 740; *Staffordshire Financial Co.* v. *Valentine*, 1910, 2 K. B. 233; *Re Campbell*, 1911, 2 K. B. 992; *Re Robinson's Settlement*, 1912, 1 Ch. 717; *Edgelow* v. *McElwee*, 1918, 1 K. B. 205; and cf. *Lodge* v. *National Union Investment Co.*, 1907, 1 Ch. 300.

(*y*) See *Gadd* v. *Provincial Union Bank*, 1909, 2 K. B. 353; reversed, nom. *Kirkwood* v. *Gadd*, 1910, A. C. 422; *Jackson* v. *Price*, 1910, 1 K. B. 143; *Re Seed*, ib. 661; *Re a Debtor* (No. 2 of 1910), 1910, W. N. 70; *Rueter* v. *Bradford Advance Co.*, 26 Times L. R. 533; *Cornelius* v. *Phillips*, 1918, A. C. 199.

gages altogether void, not only as against the original mortgagee, but also in the hands of any transferee from him, though without notice of the invalidity of the transaction (*z*). But by the Moneylenders Act, 1911 (*a*), any agreement with or security taken by a moneylender shall be and shall be deemed always to have been valid in favour of any *bonâ fide* assignee or holder for value without notice of any defect due to the operation of sect. 2 of the Moneylenders Act, 1900: but nothing in this enactment shall render valid an agreement or security in favour of an assignee or holder for value who is himself a moneylender.

§ 11.—*Sale of licensed property.*

Sale of licensed property.

On the sale of a public-house or other licensed property as a going concern, the vendor is bound, on the day fixed for completion, to produce a valid and effectual licence of the kind promised by the contract, and to indorse or to procure the holder thereof to indorse the same to the purchaser, so that the purchaser may be enabled to apply at once for interim authority to carry on the business until the next special sessions, and to apply at such sessions for a transfer of the licence (*b*). And on the sale of such property, time is of the essence of the contract; so that if the vendor cannot perform his obligation in this respect on the very day fixed for completion, the purchaser is entitled to repudiate the contract (*c*). But in the absence of special stipulation to the contrary, the vendor is not bound to do more than this, or to procure for the purchaser a transfer of the licence or even interim authority to carry on the business, and does not warrant that such transfer or interim authority shall

(*z*) *Re Robinson,* 1911, 1 Ch. 230.

(*a*) Stat. 1 & 2 Geo. V. c. 38, s. 1, also enacting that any payment or transfer of money or property made *bonâ fide* by any person, whether acting in a fiduciary capacity or otherwise, on the faith of the validity of any such agreement or security, without notice of any such defect, shall, in favour of that person, be and be deemed always to have been as valid as it would have been if the agreement or security had been valid; and requiring the moneylender in this and the above case to indemnify the borrower or any other person who is prejudiced by virtue of this enactment.

(*b*) *Tadcaster Tower Brewery Co.* v. *Wilson,* 1897, 1 Ch. 705. It is unlawful for the purchaser to carry on the business without obtaining such interim authority or transfer; *Barnard* v. *Barron,* 1906, 1 K. B. 357.

(*c*) *Seaton* v. *Mapp,* 2 Coll. 556; *Day* v. *Luhke,* L. R. 5 Eq. 336; *Claydon* v. *Green,* L. R. 3 C. P. 511; *Cowles* v. *Gale,* L. R. 7 Ch. 12; *Powell* v. *Marshall, Parkes & Co.,* 1899, 1 Q. B. 710, 712.

be procured; and the purchaser buys subject to the risks that the licence will not be renewed at the next annual Brewster sessions (*d*), that the transfer of the licence to him will be refused at the special sessions, and that interim authority will not be accorded to him (*e*).

Compensation for non-renewal of licence.

By the Licensing (Consolidation) Act, 1910 (*f*), where the compensation authority (*g*) refuse the renewal of an old on-licence under that Act, the amount therein specified (representing the difference between the value of the licensed premises with and without the licence (*h*)) is to be paid as compensation to the persons interested in the licensed premises. And the Act authorised a compensation charge at the rates therein specified to be imposed by the compensation authority in respect

Compensation charge on licences.

(*d*) See *Sharp* v. *Wakefield*, 1891, A. C. 173; stat. 4 Edw. VII. c. 23, s. 1; *Grimsdick* v. *Sweetman*, 1909, 2 K. B. 740; below, p. 467 and n. (*p*).

(*e*) *Tadcaster Tower Brewery Co.* v. *Wilson*, 1897, 1 Ch. 705.

(*f*) Stat. 10 Edw. VII. & 1 Geo. V. c. 24, s. 20 (1), replacing 4 Edw. VII. c. 23, s. 2 (1); see the Licensing Rules, 1910, Nos. 21-34. Under these rules the persons interested are the licensee, the registered owner of the premises, and any other person duly claiming and determined to be entitled to compensation thereunder; and the amount of compensation, when determined, is divided between those persons in the shares settled by the compensation authority, or otherwise as therein provided; see *Liverpool Corpn.* v. *Peter Walker & Son, Ltd.*, 1908, 2 K. B. 33; *R.* v. *Sheffield Justices*, 1916, 1 K. B. 682. Any compensation money so awarded to any person interested in the premises as owner (whether he be freeholder or lessee) stands in the place of his interest therein, is equivalent to the proceeds of a compulsory sale thereof, and is payable, where he has mortgaged that interest, to the mortgagee; *Law Guarantee, &c. Socy.* v. *Mitcham, &c. Co., Ltd.*, 1906, 2 Ch. 98; *Noakes* v. *Noakes & Co., Ltd.*, 1907, 1 Ch. 64; *Dawson* v. *Braime's, &c., Ltd.*, 1907, 2 Ch. 359; *Re Bentley's Yorkshire Breweries, Ltd.*, 1909, 2 Ch. 609. And where his interest in the premises is subject to any trust or equity, or his claim of compensation was made as agent for others, the compensation money awarded to him is subject to the same trust or equity or to his principals' rights: *Birkin* v. *Smith*, 1909, 2 K. B. 112; see also *Bent's Brewery Co., Ltd.* v. *Dykes*, 1909, W. N. 51, 100 L. T. 476. Any compensation money so awarded to a tenant for life is capital money; *Re Bladon*, 1912, 1 Ch. 45. The freeholder has an interest in a licensed house situate on copyhold land, and is entitled to share in the compensation money accordingly; *Ecclesiastical Commrs.* v. *Page*, 1911, 2 K. B. 946.

(*g*) The compensation authority is, as respects a county or a borough not being a county borough, the quarter sessions for that county, and as respects a county borough, the whole body of borough justices, but may delegate any of its duties and powers to a committee; stat. 10 Edw. VII. & 1 Geo. V. c. 24, ss. 2, 3, 6 (1); Licensing Rules, 1910, Nos. 2, 53.

(*h*) See *Re Ashby's, &c. Co.*, 1906, 2 K. B. 754; *Liverpool Corpn.* v. *Peter Walker & Son, Ltd.*, 1908, 2 K. B. 33.

of all old on-licences renewed in each year (*i*). This charge is imposed for the period from April 5th of the year in which it is payable until April 5th of the succeeding year; and on the sale of any licensed property during such period the amount of the charge is an outgoing apportionable between the vendor and purchaser accordingly (*j*). The Act further provides (*k*) that such deductions from rent as are set out in the Second Part of the Third Schedule thereto (*l*) may, notwithstanding any agreement to the contrary (*m*), be made by any holder of a licence who pays the charge and also by any person from whose rent a deduction is made in respect of the payment of the charge. The deductions so authorised constitute a charge upon the rent as against the person, who would otherwise be entitled to receive it (*n*); and regard must of course be had to this liability on the purchase of the freehold or leasehold reversion on a lease of licensed property. When a licensed house has been demised for a term of years by a lease containing a covenant by the lessee to use the premises as a licensed house and not otherwise, and the renewal of the licence is afterwards refused, the covenant is discharged for impossibility of performance (*o*), but in other

Effect of refusal to renew licence in case of a leasehold licensed house.

(*i*) Stat. 10 Edw. VII. & 1 Geo. V. c. 24, s. 21 (1), replacing 4 Edw. VII. c. 23, s. 3 (1).

(*j*) *Horton* v. *Penn*, 1907, 1 K. B. 561; see above, pp. 46, 61, 67.

(*k*) Stat. 10 Edw. VII. & 1 Geo. V. c. 24, s. 21 (3), replacing 4 Edw. VII. c. 23, s. 3 (3).

(*l*) The amount which may be so deducted varies by degrees from 100 per cent. of the charge where the tenant's unexpired term does not exceed one year down to 1 per cent. of the charge where the unexpired term exceeds 55 but does not exceed 60 years: but the amount to be deducted is in no case to exceed half the rent. The unexpired term is to date from the day on which the compensation charge is payable by the licence-holder; *London County Council* v. *Watney, &c., Ltd.*, 1909, 1 K. B. 637. It has been held that the word *term* is here used in its proper legal meaning, so that a tenant holding under an unexpired term of not more than two years was entitled to deduct the amount allowed (88 per cent.) in respect of that term, notwithstanding that he also had a reversionary lease (which only gave him an *interesse termini* at law) for a further period of years from the day but one after the date of the expiration of his existing term; *Llangattock* v. *Watney, &c., Ltd.*, 1910, 1 K. B. 236, affirmed, 1910, A. C. 394; *Knight* v. *City of London Brewery Co.*, 1912, 1 K. B. 10; see above, p. 359.

(*m*) Whether made before or after the Act; *Wooler* v. *North Eastern Breweries*, 1910, 1 K. B. 247; and see *Pumford W. Butler & Co., Ltd.*, 1914, 2 Ch. 353.

(*n*) *Re Smith*, 1906, 1 Ch. 799, 803, deciding that, where the person entitled to the rent is a tenant for life, he is not entitled to have the amount of the charge raised out of capital. See also *Hancock* v. *Gillard*, 1907, 1 K. B. 47; *Smith* v. *Lion Brewery Co., Ltd.*, 1909, 2 K. B. 912.

(*o*) See below, Chap. XVIII. § 1.

respects the lease remains valid and the lessee is accordingly bound to pay the rent reserved without any deduction on that account (*p*).

§ 12.—*Land subject to Restrictive Covenants.*

Land subject to restrictive covenants.

As we have seen (*q*), the fact that any land purchased is subject to restrictive covenants is such a defect of title as justifies the purchaser in refusing to perform the contract; unless the vendor should have expressly stipulated that the purchaser shall make no objection to the title on that account. And *a fortiori*, any statutory restriction on the use of land furnishes a like objection to the title (*r*). A vendor of land subject to such covenants or restriction must, of course, be careful to make a special condition of sale to the above effect. It is now settled, with regard to covenants relating to land and entered into by a tenant in fee with a former owner, from whom he purchased, or with an adjoining landowner (*s*), that in so far as such covenants bind the covenantor to some forbearance restrictive of the free use of his land (*t*), and were made with the object of benefiting the owners and occupiers of some other land retained by the former owner or belonging to the adjoining landowner, as the case may be (*u*), the burthen thereof runs with the land in equity, though not at law; that is to say, the restrictions are enforceable in equity by action for an

Statutory restriction.

(*p*) *Grimsdick* v. *Sweetman*, 1909, 2 K. B. 740.

(*q*) Above, pp. 153, 181-183.

(*r*) *Bird* v. *Eggleton*, 29 Ch. D. 1012; *Re Ponsford and Newport School Board*, 1894, 1 Ch. 454; *Re Bosworth and Gravesend Corpn.*, 1905, 1 K. B. 403, 2 K. B. 426.

(*s*) The law is the same where the adjoining landowner is the covenantor's lessee; *Brigg* v. *Thornton*, 1904, 1 Ch. 386; *Ricketts* v. *Enfield Churchwardens*, 1909, 1 Ch. 544.

(*t*) See *Powell* v. *Hemsley*, 1909, 1 Ch. 680, 2 Ch. 252, where it was considered that a covenant to submit plans before commencing any building implied an obligation not to build without first submitting plans. Under such a covenant the covenantor is not liable to pay the fees of the covenantee's surveyor for approving the plans; *Reading Industrial Co-operative Socy., Ltd.* v. *Palmer*, 1912, 2 Ch. 42. Restrictive covenants are however construed strictly, and not so as to create a wider obligation than is imported by the words actually used; *Brigg* v. *Thornton*, 1904, 1 Ch. 386.

(*u*) See *Renals* v. *Cowlishaw*, 9 Ch. D. 125, 11 Ch. D. 866; *Formby* v. *Barker*, 1903, 2 Ch. 539; *Reid* v. *Bickerstaff*, 1909, 2 Ch. 305, 320, 325-328; *Millbourn* v. *Lyons*, 1914, 2 Ch. 231; *London County Council* v. *Allen*, 1914, 3 K. B. 642; cf. *Ives* v. *Brown*, 1919, 2 Ch. 314, as to which case, see below, p. 469, n. (*y*).

injunction against all persons who acquire the land from the covenantor, either by act of law or assignment (*v*), except only (as in the case of other equities) such assigns as have acquired the legal estate in the land as purchasers for value in good faith, without notice of the covenant (*x*). But the burthen of covenants by a tenant in fee to do some positive act upon or relating to his land, as to repair a road or build a house or a wall, does not run with the land either at law or in equity. And where a landowner enters into restrictive covenants with some person, but not with the object of benefiting the owners and occupiers of some other land belonging to the covenantee, as where a vendor sells all his land in some particular place, retaining no adjoining or neighbouring land, and the purchaser enters into covenants restrictive of the use thereof with the vendor, the burthen of the covenants does not run in equity with the covenantor's land, and the covenantee cannot enforce them

Formby v. *Barker.*

(*v*) *Tulk* v. *Moxhay*, 2 Ph. 774; *Austerberry* v. *Oldham*, 29 Ch. D. 750; *Spicer* v. *Martin*, 14 App. Cas. 12; *Mackenzie* v. *Childers*, 43 Ch. D. 265; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388; *Frost* v. *King Edward VII. Welsh, &c. Assn.*, 1918, 2 Ch. 180. In *Re Nisbet and Potts' Contract*, 1905, 1 Ch. 391, 1906, 1 Ch. 386, it was held that the burthen of restrictive covenants is incumbent on a person, who has wrongfully ejected the covenantor or his successor in estate bound by the covenants. This decision is however inconsistent with the rule laid down in *Finch's Case*, 4 Inst. 85 (which was not cited to the Court), that a disseisor is not bound by a trust incumbent on the disseisee; and it is respectfully submitted that the case of *Re Nisbet and Potts* was decided on erroneous principles; see the author's criticism in 51 Sol. J. 141, 155; Wms. Real Prop. 191-193, 23rd ed.

(*x*) *Carter* v. *Williams*, L. R. 9 Eq. 678; *London & South Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562, 583; *Nottingham, &c. Co.* v. *Butler*, 16 Q. B. D. 778, 787, 788; *Rowell* v. *Satchell*, 1903, 2 Ch. 212, 221. Notice may, of course, be either actual or constructive: *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Patman* v. *Harland*, 17 Ch. D. 353; above, pp. 232 *sq.* Where land subject to the burthen of restrictive covenants is taken under the Lands Clauses Act, 1845 (stat. 8 & 9 Vict. c. 18), and the parties entitled to the benefit of the covenants receive compensation, the burthen is extinguished. If however such parties be not compensated, the burthen of the covenants continues to affect the land; although, so long as the land is used in accordance with the statutory powers, under which it was taken, the rights given by those powers are paramount to the obligation of the covenants; *Kirby* v. *Harrogate School Board*, 1896, 1 Ch. 437; *Long Eaton, &c. Co.* v. *Midland Ry.*, 1902, 2 K. B. 574. But if the land be sold or disposed of as superfluous, the burthen (if not extinguished by payment of compensation) will revive; *Ellis* v. *Rogers*, 29 Ch. D. 661; *Bird* v. *Eggleton*, ib. 1012. With respect to the powers of a corporation, which has been authorised by statute to acquire land for some special purpose, to enter into covenants restrictive of its use, see *Re South Eastern Ry. Co. and Wiffin's Contract*, 1907, 2 Ch. 366; *Stourcliffe Estates Co., Ltd.* v. *Bournemouth Corpn.*, 1910, 2 Ch. 12; below, Chap. XVI.

by action for an injunction against the covenantor's assigns, whether they had notice of the covenants or not; for the burthen imposed in equity by restrictive covenants is analogous to the burthen of an easement, which cannot exist in the absence of a dominant tenement (*y*). In such cases the covenantors and

(*y*) *Formby* v. *Barker*, 1903, 2 Ch. 539; *Millbourn* v. *Lyons*, 1914, 1 Ch. 34, 2 Ch. 231, where a vendor of land, after stipulating in the contract that the conveyance should contain a covenant restricting the use of the land sold, to be entered into by the purchaser, and so as to bind his heirs and assigns, with the vendor, his heirs and assigns, *owners and occupiers of certain adjoining land of his*, sold all such adjoining land between the dates of the making and the completion of the contract; and it was held that the covenant was not enforceable in equity against the purchaser's assigns of the land sold; *London County Council* v. *Allen*, C. A., 1914, 3 K. B. 642, where the covenantee had no land, to which the benefit of the restrictive covenant could be annexed, and it was held that the covenant, though enforceable by injunction at suit of the covenantee against the covenantor himself with respect to land retained by him, as to which the covenant was to be observed, was not so enforceable against his assigns of such land. Cf. *Ives* v. *Brown*, Sargant, J., 1919, 2 Ch. 314, 323, 324, where it was held that restrictive covenants, decided *not* to be so expressed as to annex the benefit thereof to any particular land of the covenantee, might be enforced by injunction against the covenantor's devisees of the land, as to which the covenants were to be observed, at suit of the covenantee's executors, jointly with the covenantee's devisees of land belonging to him, to which the benefit of the covenants *might* well, *if so expressed*, have been annexed; notwithstanding that the covenantee's devisees were held not to be assigns by his will of the benefit of such covenants and not to be capable of suing alone thereon. It is respectfully submitted that this decision is open to question. If, as was decided, the covenantee's devisees could not sue alone to enforce the covenants, it is submitted that the covenantee's executors' right to sue upon the covenants must have accrued to them solely as succeeding by law to the benefit of the *personal* covenant with their testator and not as being entitled to any land intended to be benefited by such covenants. If so, would not such executors' remedy on the covenants lie in damages only; and how could it be enlarged into a right to enforce the covenants specifically by injunction by the joinder of the devisees, who in themselves were held to have no cause of action at all? No doubt in that case the covenantee's executors were entitled to enforce the *personal* covenant, that is, in damages, and the covenantor's devisees were liable in damages, as well his heirs, executors and administrators, on their testator's covenants binding his heirs; see Wms. Real Prop. 303, 304, 23rd ed. But if, as happened, on the covenantee's death the right to enforce the personal covenant, and the ownership of the land which might in the covenantee's lifetime have benefited thereby, were severed, and his executors succeeded to the bare right to enforce the personal covenant, while the land was devised to other persons, in what respect did the executors' position differ from that of the covenantees, or their executors, in the other cases cited in this note? It is respectfully submitted that in *Ives* v. *Brown* the covenantee's executors were in exactly the same position as the plaintiffs in *Formby* v. *Barker* and *London County Council* v. *Allen*, or the vendor's executors in *Millbourn* v. *Lyons;* they were not the owners of any land of which the enjoyment could be increased by the enforcement of the covenants. How then could they be entitled to enforce the covenants by injunction,

Millbourn v. *Lyons*.

Ives v. *Brown*.

Criticism of that case.

their representatives in law are liable personally upon such covenants; but their assigns of the land, as such, do not come under any liability in respect thereof (*z*). It is therefore no objection to the title to land that the owner or his predecessor seised thereof in fee has entered into some covenant relating thereto, either of a positive and not of a restrictive nature, or of a restrictive nature but not made with the object of benefiting some other land.

How restrictions on the use of land may be created.

With respect to stipulations restrictive of the use of land, they may be attached to land as a burthen thereon in equity, not only by express covenant, but also by an express or implied

when the specific enforcement thereof could not be of any benefit to him? But if the executors alone had no cause of action for an injunction and the covenantee's devisees alone had none, how could they possibly have a good cause of action for an injunction together? In mathematics, $0 + 0$ is not $= 1$; and it is respectfully submitted that this proposition is equally true in law. If the covenantee's devisees had been his assigns by his will of the benefit of the covenants, or if his executors had also been his devisees of the land, of which the enjoyment might be increased by the observance of the covenants, the case would have been different; for then the devisees, or the executors, would have stood in the same place in all respects as the original covenantee, and would have had good ground (as it is submitted) for maintaining an action for an injunction against the covenantor himself. But it is respectfully submitted that even in these two cases (and *a fortiori* in the actual circumstances of *Ives* v. *Brown*) it is open to question whether the restrictive covenants could rightly be enforced by injunction against the covenantor's *assigns*, as his devisees are, of the land, as to which the covenants were to be observed; for the principle established by the decisions of the Court of Appeal in *Formby* v. *Barker*, *Millbourn* v. *Lyons* and *London County Council* v. *Allen* is that the burthen of such covenants can *only* run in equity with the land, as to which the covenants are to be observed, when by the express or implied intention of the parties to the covenant the benefit thereof is attached in equity to some other particular land belonging to the covenantee. And would the covenantor's devisees rightly be held liable to an injunction obliging them to observe the restrictive covenants specifically, merely because they are liable in damages for their testator's covenants, such liability being essentially an obligation to satisfy their testator's *pecuniary* liabilities in case his personal estate should be insufficient for the purpose? Neither *Millbourn* v. *Lyons* nor *London County Council* v. *Allen* was cited in *Ives* v. *Brown*.

(*z*) *Haywood* v. *Brunswick, &c. Society*, 8 Q. B. D. 403; *Austerberry* v. *Oldham*, 29 Ch. D. 750; *Holford* v. *Acton, &c.*, 1898, 2 Ch. 240; and cases cited in the previous note. The personal liability to damages at law for breach of a restrictive covenant exists equally where the covenant was expressly made for the benefit of some particular land: but the covenantor is under no greater liability at law for the acts of his assigns than he has assumed by the terms of his covenant, and he is not so liable for breaches of covenant committed by his assigns without his assent, unless he has expressly undertaken such liability; see *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180, 186, 187; *Hall* v. *Ewen*, 37 Ch. D. 74, 82; *Powell* v. *Hemsley*, 1909, 1 Ch. 680, 688, 689, 2 Ch. 252, 256-258.

contract entered into, without deed, by the tenant in fee simple of the land (*a*). Thus, where lands are laid out and sold in plots as a building estate, and by the conditions of sale the purchasers are required for their mutual benefit to observe stipulations restrictive of the use of the plots purchased, the burthen of these stipulations will be attached in equity to the purchased lands, although the purchasers should not enter into any deed of covenant to observe the same. And if in such case it appear from the conditions or the circumstances attending the sale that the intention is that the purchasers shall have the benefit of the restrictive stipulations as regards all the lands offered for sale, the burthen of these stipulations will attach to any of the lands which may remain unsold, and will be enforceable accordingly against the vendor, his representatives in law and assigns taking with notice thereof (*b*). And not only may lands be subjected to the burthen of restrictive stipulations by contract implied on the part of the tenant in fee from the terms on which he has offered the same, together with adjoining lands, for sale and has sold the adjoining lands to purchasers; but if a block of lands or houses be offered to be let on lease on the terms that all the tenants shall enter into the same restrictive covenants, so that each tenant is offered the advantage to be gained from the other tenants' covenants, any of the lands or houses remaining unlet will be subject, in the hands of the lessor, his representatives in law and assigns with notice, to the burthen of the restrictive stipulations (*c*). And in such cases it appears that the agreement giving rise to an equitable right to enforce the restrictions may be established by parol evidence, notwithstanding the Statute of Frauds (*d*), under the doctrine of part performance (*e*). It follows that anyone who is about

(*a*) *Tulk* v. *Moxhay*, 2 Ch. 774, 778; *Carter* v. *Williams*, L. R. 9 Eq. 678.

(*b*) See *Renals* v. *Cowlishaw*, 9 Ch. D. 125, 11 Ch. D. 866; *Spicer* v. *Martin*, 14 App. Cas. 12; *Mackenzie* v. *Childers*, 43 Ch. D. 265; *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342; *Holford* v. *Acton, &c.*, 1898, 2 Ch. 240, 246; *Rowell* v. *Satchell*, 1903, 2 Ch. 212; *Elliston* v. *Reacher*, 1908, 2 Ch. 374, 665; cf. *Tucker* v. *Vowles*, 1893, 1 Ch. 195; *Reid* v. *Bickerstaff*, 1909, 2 Ch. 305; *Willé* v. *St. John*, 1910, 1 Ch. 84, 325.

(*c*) *Spicer* v. *Martin*, 14 App. Cas. 12.

(*d*) Stat. 29 Car. II. c. 3, s. 4; above, p. 3.

(*e*) Above, pp. 12, 13; *Piggott* v. *Stratton*, 1 De G., F. & J. 33, 49; and see Lord Macnaghten's judgment in *Spicer* v. *Martin*, 14 App. Cas. 12, 20-25, where he considered that though the appellant might not have incurred any contractual liability on the construction of the correspondence between the parties, and had not made any false repre-

to sell or let lands in lots, subject to restrictive covenants to be entered into by the various purchasers or lessees, should be careful, unless he is willing that the unsold or unlet land shall be affected with the same burthen, to stipulate expressly that, as regards any of the lots which shall not be sold or let, he shall not stand in the place of a purchaser or lessee thereof so as to be bound by the covenants (*f*). If land subject to any stipulation restrictive of the user thereof come to the hands of anyone who takes the legal estate as purchaser for value in good faith without notice of the restriction, he is, as we have seen (*g*), entitled to hold the land free from the restriction, and any purchaser from him will enjoy the same immunity, even though such purchaser bought with notice of the restriction (*h*). But if a man's title to hold land free from some such restriction depend on proof of the fact that he so purchased the same without notice as above mentioned, he will not be able to oblige a purchaser from him under an open contract to specific performance of the agreement for sale (*i*); for the Court considers that a title depending on proof of such a fact is too doubtful to force upon an unwilling purchaser (*j*). In such a case, therefore, the vendor must be careful to protect himself by a special condition of sale.

Devolution of the benefit of restrictive covenants.

With respect to the devolution of the benefit of a covenant or contract restrictive of the use of the land and entered into by a tenant in fee with a vendor or an adjoining landowner, the question to be considered is whether the parties to the contract intended that the benefit thereof should enure to the person

sentation, which he was estopped from disputing, as to an existing fact, he had nevertheless "invited the public to come in and take a portion of an estate which was bound by one general law." This invitation or offer, however, could only be established by admitting evidence, outside the written memorandum of the contract for letting, of the circumstances under which the appellant had bought and subsequently let the lands in question.

(*f*) See 1 Davidson, Prec. Conv. 712, 4th ed.; 576, 5th ed.; Davidson's Concise Precedents, 130, 19th ed.; *Osborne* v. *Bradley*, 1903, 2 Ch. 446; *Whitehouse* v. *Hugh*, 1906, 2 Ch. 283, where power was reserved on a sale of allowing a variation of the plans and conditions; *Mayner* v. *Payne*, 1914, 2 Ch. 555 (power reserved to the vendor of allowing a departure from the stipulations); and cf. *Elliston* v. *Reacher*, 1908, 2 Ch. 374, 665.

(*g*) Above, p. 468.

(*h*) *Wilkes* v. *Spooner*, 1911, 2 K. B. 473.

(*i*) *Nottingham, &c. Co.* v. *Butler*, 16 Q. B. D. 778.

(*j*) *Freer* v. *Hesse*, 4 De G., M. & G. 495; *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599.

originally entitled to enforce the obligation in his capacity of owner of some neighbouring land and should be annexed to the ownership of that land (*k*). If this be the case, the benefit of the contract will pass, without express mention, by a conveyance of that land, in the same manner as an easement appurtenant thereto will pass therewith at law (*l*); and any assign, whether in fee or for any less estate (*m*), of the neighbouring land will be entitled in equity to enforce the restrictions (*n*). And for this purpose it is not necessary that the assign should be *in* of the same estate as the original contractor had (*o*). If the restrictions be created by covenant, it appears that the benefit of the covenant will run at law with the land, for the advantage of which the restrictions were imposed; but that an assignee of the land could not sue on the covenant at law unless he took the original covenantor's estate therein (*p*). On the other hand, an assign of the person, in whose favour the covenant or contract was made, will have no right to enforce the restrictions if he cannot prove either (1) that he is an express assignee by act of the parties or in law of the benefit of the covenant, and is also entitled to some land for the benefit of which the covenant was made (*q*), or (2) that the covenant was made for the benefit of some particular land, to which the benefit of the covenant was thus annexed and of which he is the assign, or (3) that there was a building or similar scheme annexing restrictions on certain pieces of land for the benefit of all purchasers or lessees thereof (*r*), and he derives title to one of those

(*k*) See *Elliston* v. *Reacher*, 1908, 2 Ch. 374, 384, 665; *Reid* v. *Bickerstaff*, 1909, 2 Ch. 305, 319, 320 *sq.*; *Willé* v. *St. John*, 1910, 1 Ch. 84, 325; and other cases cited above, pp. 467, n. (*u*), 468, n. (*v*), 471, n. (*b*).

(*l*) *Child* v. *Douglas*, Kay, 560, 568; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388; *Elliston* v. *Reacher*, ubi sup.

(*m*) *Taite* v. *Gosling*, 11 Ch. D. 273; *Frost* v. *King Edward VII. Welsh, &c. Assn.*, 1918, 2 Ch. 180.

(*n*) *Whatman* v. *Gibson*, 9 Sim. 196; *Mann* v. *Stephens*, 15 Sim. 377; *Coles* v. *Sims*, 5 De G., M. & G. 1; and cases cited in the two preceding notes.

(*o*) See note (*l*), above.

(*p*) *Rogers* v. *Hosegood*, 1900, 2 Ch. 388, 404.

(*q*) See above, pp. 467 and n. (*u*), 468, 469 and n. (*y*). It is submitted that an assignee of the benefit of the covenant, who is not the owner of any land, for the benefit of which the covenant was made, is only entitled to enforce the covenant in damages and has not the right to enforce the restrictions by injunction.

(*r*) See above, pp. 471, 472; and consider *King* v. *Dickeson*, 40 Ch. D. 596, deciding that, where a *part* of one lot, to which is annexed the benefit of restrictive covenants over the other lots, is sold subse-

pieces of land as or through such a purchaser or lessee (*s*). When the benefit of such a covenant or contract has passed to an assign of the land, for the advantage of which the restriction was created, the burthen of the contract cannot, of course, be effectually released by any act or any deed of the person originally entitled to enforce the argument (*t*); unless the right for him to release the restrictions were expressly reserved in the argument (*u*). If a landowner entitled to the benefit of a contract restricting the use of adjoining land make or permit such use of his own land that it would be unreasonable for him to insist any longer on the observance of the restrictions with respect to the adjoining land, he will lose his equitable right to enforce such restrictions specifically by action for an injunction (*x*). Such a landowner may also lose this equitable right by acquiescence in breach of the restrictions or delay in asserting the right (*y*). These facts will not, however, deprive him of any right he may have to enforce the contract at law, although they may be taken into consideration in assessing the amount of damages recoverable (*z*). But after long acquiescence by the covenantee in a breach of the covenant, a waiver of the covenant will be presumed (*a*). If land

Loss of right to enforce restrictions.

quently to the sale creating the restrictions, the vendor of such part, or any other owner of the remainder of that lot, is not entitled, in the absence of an express stipulation enabling him to do so, to enforce the restrictions against the purchaser of such part or any persons claiming under him.

(*s*) *Elliston* v. *Reacher*, 1908, 2 Ch. 374, 384, 665; *Reid* v. *Bickerstaff*, 1909, 2 Ch. 305, 319, 320 *sq.*; *Willé* v. *St. John*, 1910, 1 Ch. 84, 325.

(*t*) *Rogers* v. *Hosegood*, 1900, 2 Ch. 388.

(*u*) *Mayner* v. *Payne*, 1914, 2 Ch. 555, where the vendor reserved the right of allowing a departure from the restrictive stipulations or any one or more of them.

(*x*) *Bedford* v. *Trustees of British Museum*, 2 My. & K. 552. See *Osborne* v. *Bradley*, 1903, 2 Ch. 446, but note that the ground on which that decision is founded (viz., that the restriction was created for the benefit of the vendor, but not as the owner of any particular property) appears to be taken away by the decision in *Formby* v. *Barker*, above, p. 468; *Elliston* v. *Reacher*, 1908, 2 Ch. 374, 393, 665; *Sobey* v. *Sainsbury*, 1913, 2 Ch. 513, 528, 529.

(*y*) *Roper* v. *Williams*, T. & R. 18; *Peek* v. *Matthews*, L. R. 3 Eq. 515; *Gaskin* v. *Balls*, 13 Ch. D. 324; *Sayers* v. *Collyer*, 28 Ch. D. 103; see *German* v. *Chapman*, 7 Ch. D. 271; *Knight* v. *Simmonds*, 1896, 2 Ch. 294; *Rowell* v. *Satchell*, 1903, 2 Ch. 212; *Osborne* v. *Bradley*, 1903, 2 Ch. 446; *Elliston* v. *Reacher*, 1908, 2 Ch. 374, 392, 665; *Sobey* v. *Sainsbury*, 1913, 2 Ch. 513, 528, 529.

(*z*) See *Bedford* v. *Trustees of British Museum*, 2 My. & K. 552; *Sayers* v. *Collyer*, 28 Ch. D. 103.

(*a*) *Hepworth* v. *Pickles*, 1900, 1 Ch. 108.

be sold together with the benefit of any covenant or contract restricting the use of any adjoining land, the vendor must, of course, prove his title to this advantage, as in the case of his selling any easement or other legal right exercisable over any land of which he is not the owner. And if a man sell land together with the advantage of some restriction to be newly created as to the use of other land of his own, he must show a good title to the latter piece of land as well as the former (*b*).

Title to benefit of restrictive covenant.

§ 13.—*Investigation of title in view of a mortgage.*

Investigation of title in view of mortgage.

A few words may be added on the investigation of title in view of taking a mortgage of land. When it is proposed to obtain a loan of money on the security of a mortgage of land, the title is usually investigated even more strictly than on a sale (*c*): but the parties stand in a very different position from that of a vendor and purchaser. In the first place, it is not usual for persons proposing to lend money on a mortgage of lands to bind themselves by contract to make the loan (*d*). They are, therefore, generally in a position to exact any evidence of title which they may choose to demand, as they can at any time decline to proceed with the transaction, if the title produced is in any respect insufficient. They should, however, before commencing the investigation of the title to the lands proposed to be mortgaged or incurring any other trouble or expense in the matter, be careful to stipulate expressly that the mortgagor shall pay all their costs and expenses of and incident to the transaction proposed in any event, whether they choose to make the loan or not. For although the regular course of practice, where a mortgage is completed, is for all costs incurred by the mortgagee in investigating the title, valuing the land, and otherwise preparing for the loan, to be paid by the mortgagor (*e*), yet where the parties are not bound to each other by any contract, there is no obligation on the mortgagor to discharge such

Mortgagee's costs on a completed or proposed mortgage.

(*b*) Above, p. 416, and n. (*d*).

(*c*) Wms. Real Prop. 449, 13th ed.; 655, 22nd ed.

(*d*) Davidson, Prec. Conv. vol. ii. pt. i. p. 104, n. (*a*), 4th ed.

(*e*) See *Re Foster*, 1920, 3 K. B. 306, 317, 318. If the loan be made without such costs being paid, they cannot be added as mortgagee's costs to the security: but they are recoverable by the mortgagee from the mortgagor personally under an implied contract of indemnity: *Wales* v. *Carr*, 1902, 1 Ch. 860.

costs, if the loan be not made (*f*). Unless, therefore, an intending mortgagee make the above-mentioned express stipulation, he runs the risk of being out of pocket by the transaction, if he should be obliged to decline the loan on account of some defect in the title. If an agreement should be made that one shall lend and another borrow money on mortgage of some particular land, it is not an implied term of the contract that the borrower shall prove his title to the land for the last sixty or forty years, or any other particular period; as the transaction of borrowing implies that securities of every degree of safety may be made available, any risk run with regard to the title being compensated by the terms agreed upon as to the rate of interest to be paid or otherwise (*g*). It is not, therefore, a breach of such a contract for the borrower to fail to show a good marketable title to the land: although the contract would appear to be broken if the borrower should fail to produce any property of his corresponding with that described in the contract. The Court will not, however, specifically enforce a contract to lend money on mortgage of some particular property at suit of either the borrower or the lender (*h*); unless the money should have been first actually advanced by the lender on the borrower's promise to give the particular security (*i*): but the person aggrieved by a breach of such a contract may recover damages proportionate to the loss he has sustained (*k*). It follows that, if an intending mortgagee of land should contemplate entering into a contract to make the loan, he should expressly stipulate that the borrower shall first show a good marketable title to the land to the satisfaction of the lender's counsel, that the lender

Contract to make and take a mortgage.

(*f*) *Rigley* v. *Daykin*, 2 Y. & J. 83; *Wilkinson* v. *Grant*, 18 C. B. 319; *Melbourne* v. *Cottrell*, 5 W. R. 884, 29 L. T. O. S. 293. But where the Court sanctioned a mortgage of an infant's estate, and the matter went off without the proposed mortgagee's default, he was allowed his costs of investigating the title out of the infant's estate: *Craggs* v. *Gray*, 35 Beav. 166.

(*g*) *Melbourne* v. *Cottrell*, ubi sup.; and see *National Provincial Bank of England* v. *Games*, 31 Ch. D. 582.

(*h*) *Rogers* v. *Challis*, 27 Beav. 175; *Sichel* v. *Mosenthal*, 30 Beav. 371; *South African Territories, Ltd.* v. *Wallington*, 1897, 1 Q. B. 692, 1898, A. C. 309.

(*i*) *Ashton* v. *Corrigan*, L. R. 13 Eq. 76; *Hermann* v. *Hodges*, L. R. 16 Eq. 18; *Taylor* v. *Eckersley*, 2 Ch. D. 302.

(*k*) See *Western Wagon, &c. Co.* v. *West*, 1892, 1 Ch. 271, 277; *South African Territories, Ltd.* v. *Wallington*, ubi sup. Where the borrower under such a contract breaks off the transaction without reason, the lender can recover his solicitor's costs as damages: *Carter* v. *Merrion*, 32 L. T. N. S. 663.

shall be at liberty to rescind the contract if his counsel shall not accept the title, and that the borrower shall pay all the lender's costs (*l*) and expenses of and incident to the transaction in any event, whether the loan be made or not. If it be intended that the lender shall recover any compensation beyond expenses out of pocket in the event of the loan not being made, such as interest for his money whilst lying idle, this must be the subject of express stipulation (*m*).

What title should be required on behalf of a mortgagee.

In advising on title on behalf of an intending mortgagee, it must be remembered that the object of the transaction proposed is very different from that of a sale. Purchasers generally buy land with the view of occupying or enjoying it; they seldom buy it for immediate re-sale. But the object of a mortgagee is simply to obtain good security for the repayment of his money, whenever he may desire to call it in. And, assuming that the valuation of the land is satisfactory, what conduces most to this end is that he should be able at any time to exercise effectually his best and most convenient remedy, which is his power of sale. While purchasers, therefore, so long as they can obtain a good holding title, are often willing to waive defects of title which will be cured by lapse of time or may be covered by special conditions on a re-sale, a mortgagee will always desire to get a good marketable title; for he contemplates the possibility of having recourse to a forced sale, when special conditions, in spite of the avidity with which they are usually swallowed at the auction mart, may be depreciatory. The conveyancer advising an intending mortgagee should therefore see that his client will obtain a good marketable title, that is, a title under which the property can be put up for sale without any special conditions restricting the purchaser's rights, or which an unwilling purchaser under an open contract would be obliged to accept (*n*). As we have seen (*o*), an intending mortgagee is not usually bound, as a purchaser very commonly is, by any contract requiring him to accept less than a good market-

Good marketable title.

(*l*) Where an intending borrower agreed to pay the lender's reasonable costs in case the loan went off, it was held that this did not include the commission charged by the lender's bankers for withdrawing his money from deposit: *Re Blakesley and Berwick*, 32 Beav. 379.

(*m*) *Sweetland* v. *Smith*, 3 Tyrw. 491.

(*n*) *Pyrke* v. *Waddingham*, 10 Hare, 1, 8.

(*o*) Above, p. 475.

able title. If it should be proposed that an intending mortgagee should accept a title less than this, the question, whether he may reasonably concede what is asked, should be determined by considering whether the suggested concession will practically hamper the exercise of his power of sale. And as a mortgagee on completion gets only a parchment security, and does not, like a vendor, enter into possession of the land, there is the more reason for seeing that the evidence of the mortgagor's title is in every respect complete. The title deeds especially should be examined with most particular care (*p*); for frauds and forgeries have been far more frequently effected in connection with the mortgage of land, where there is no transfer of the actual possession, than upon sale. As regards the evidence both of any facts material to the title and the identity of the premises, a mortgagee will, as a rule, require strict proof according to conveyancing practice (*q*). We have seen (*r*) that purchasers, who have to pay out of their own pockets the expense of procuring evidence not in the vendor's possession, often content themselves with informal evidence, or sometimes waive proof of such matters, especially where the vendor and his predecessors have long been known as the owners of the land. But an intending mortgagee cannot safely dispense with good evidence in these respects. With these differences, the investigation of title in view of a mortgage of land is carried out in like manner as upon a sale.

Transfer of mortgage.

Investigation of title prior to taking a transfer of a mortgage is, of course, governed by the same considerations as arise on a proposal for a new mortgage. On the transfer of a mortgage, made without the privity of the mortgagor, the transferee takes subject to the state of account then existing between the mortgagor and the mortgagee (*s*). And if the transferee omit to give to the mortgagor notice of the transfer, he will not be entitled to hold his legal estate in the mortgaged property as security for any sums of money paid since the transfer by the mortgagor to the original mortgagee on account either of

(*p*) See above, p. 131.
(*q*) Above, pp. 120 *sq.*, 131.
(*r*) Above, pp. 129, 130.
(*s*) *Matthews* v. *Wallwyn*, 4 Ves. 118; *De Lisle* v. *Union Bank of Scotland*, 1914, 1 Ch. 22, 31; cf. *Bickerton* v. *Walker*, 31 Ch. D. 151; *Bateman* v. *Hunt*, 1904, 2 K. B. 530.

interest or principal (*t*). A transfer of a mortgage, therefore, cannot safely be taken from the mortgagee alone without first inquiring of the mortgagor as to the state of the mortgage debt and the interest thereon and obtaining a favourable reply, and giving notice of the transfer to the mortgagor. In practice the mortgagor is always made a party to a transfer of the mortgage whenever his concurrence can be procured (*u*).

(*t*) *Williams* v. *Sorrell*, 4 Ves. 389; *Re Lord Southampton's Estate*, 16 Ch. D. 178, 185, 187; *Turner* v. *Smith*, 1901, 1 Ch. 213; see *Dixon* v. *Winch*, 1900, 1 Ch. 736.

(*u*) See Davidson, Prec. Conv. vol. ii. part ii. p. 264, 4th ed.

CHAPTER XI.

OF THE EFFECT OF THE CONTRACT PENDING COMPLETION.

§ 1. Of the rights and liabilities of the parties pending completion in respect of the property sold.

§ 2. Of the transfer pending completion of the rights and liabilities under the contract.

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§ 1.—*Of the rights and liabilities of the parties pending completion in respect of the property sold.*

Provisionally the purchaser becomes owner in equity.

The effect of the contract upon the position of the parties has already been shortly stated (*a*). Unlike the case of goods, the legal estate in land can never pass by the contract itself; a conveyance distinct from the contract is always required (*b*). But there is a considerable likeness between the effect of the unconditional sale of a particular chattel at law and the effect in equity of the sale of lands. For in equity, subject to the vendor's duty of showing a good title, to his lien for the price, and to his right to the rents and profits up to the proper time for completion, the whole estate contracted for in the lands sold is considered as belonging to the purchaser as from the date of the contract for sale (*c*). As from that date, therefore, the vendor is bound to use the same care in preserving or managing the property sold as a trustee must use with regard to the property subject to his trust (*d*). As from that date the property stands at the purchaser's risk as regards all losses caused without the vendor's fault, as through tempest, flood, fire, or fall in prices (*e*); and the purchaser takes the benefit of

(*a*) Above, pp. 46, 47.
(*b*) Wms. Pers. Prop. 69, 70, 76-78, 17th ed.
(*c*) Above, pp. 46, and n. (*m*), 47.
(*d*) Above, p. 46 and n. (*o*).
(*e*) *Poole* v. *Shergold*, 1 Cox, 273; *Paine* v. *Meller*, 6 Ves. 349, 352; *Harford* v. *Purrier*, 1 Madd. 532, 539; *Robertson* v. *Skelton*, 12 Beav. 260; Sug. V. & P. 291; *Rayner* v. *Preston*, 18 Ch. D. 1; *Castellain* v. *Preston*, 11 Q. B. D. 380.

all improvements casually happening thereto, such as the death of the tenant for life on the purchase of the reversion (*f*). And as from that date in equity the lands sold are the purchaser's lands (*g*), and, if freehold or copyhold, are the purchaser's real estate (*h*), and are in the vendor's hands converted into personalty (*i*). But this passing of the equitable estate in the lands sold to the purchaser is subject to the condition that the contract be such as can be specifically enforced in equity; and if this condition fail, as by the want of a good title on the vendor's part, the lands remain the vendor's property in equity as well as at law (*j*). It is, of course, by reason of the doctrine that, as regards the consquences of any act contemplated by a binding agreement, equity regards what ought to be done as actually accomplished (*k*), that in the interval between contract and conveyance the property belongs in equity to the purchaser, for whom the vendor is constructively a trustee (*l*). This trusteeship is not absolute, for the vendor has a personal and substantial interest in the property, which he is entitled to protect (*m*). As a trustee for the purchaser, the vendor is bound, as we have seen, to take proper care of the property. His beneficial interest in the land sold consists, first, in his lien thereon for the price, involving the right to hold possession of the land until the whole

Vendor is trustee for purchaser.

(*f*) *White* v. *Nutts*, 1 P. W. 61, 62; *Ex parte Manning*, 2 P. W. 410; Sug. V. & P. 291, 292; Dart, V. & P. 248, n. (*u*), 649, 5th ed.; 286, n. (*u*), 732, 6th ed.; 672, 7th ed.

(*g*) Above, p. 46 and n. (*m*).

(*h*) Thus, the lands sold will pass under a devise of all the purchaser's lands or real estate: *Greenhill* v. *Greenhill*, Prec. Ch. 320; *Atcherley* v. *Vernon*, 10 Mod. 518, 526-529; *Potter* v. *Potter*, 1 Ves. sen. 437; *Capel* v. *Girdler*, 9 Ves. 509, 510; *Marston* v. *Roe* d. *Fox*, 8 A. & E. 14, 63; Sug. V. & P. 175, 183 *sq.*; *Re Kensington*, 1902, 1 Ch. 203; *Re Taylor*, 1910, 1 K. B. 562, 571, 572, 580.

(*i*) *A.-G.* v. *Brunning*, 8 H. L. C. 243, 255, 265.

(*j*) *Broome* v. *Monck*, 10 Ves. 597; Sug. V. & P. 191, 193; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506-508; *Re Thomas*, 34 Ch. D. 166; *Ridout* v. *Fowler*, 1904, 1 Ch. 658, 2 Ch. 93; see above, pp. 435, 437.

(*k*) *Re Cary-Elwes' Contract*, 1906, 2 Ch. 143, 149; Wms. Real Prop. 197, 23rd ed.

(*l*) The vendor is not an *express* trustee for the purchaser; *Doe* d. *Stanway* v. *Rock*, 4 Man. & Gr. 30; *Tofts* v. *Stephenson*, 7 Hare, 1, 14, 15; and see *Petre* v. *Petre*, 1 Drew. 371, 393; *Cunningham* v. *Foot*, 3 App. Cas. 974, 984; *Banner* v. *Berridge*, 18 Ch. D. 254, 263; *Sands* to *Thompson*, 22 Ch. D. 614, 617; *Price* v. *Phillips*, 1894, W. N. 213.

(*m*) *Shaw* v. *Foster*, L. R. 5 H. L. 321, 338; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506; *Rayner* v. *Preston*, 18 Ch. D. 1, 6; *Re Stucley*, 1906, 1 Ch. 67, 78; *Allen* v. *Inland Revenue Commissioners*, 1914, 1 K. B. 327, 334.

purchase money be paid (*n*); and secondly, in the right to take for his own use the rents and profits up to the proper time for completion, that is, the time fixed by the contract for completion or, under an open contract, the time when a good title shall have been shown (*o*). And the vendor lies under the obligation, correlative to the latter benefit, of discharging all outgoings due in respect of the property sold up to the same time (*p*). We will first consider the rights of the purchaser, and the vendor's consequent liability to him, and will then examine the vendor's rights.

Purchaser bears losses and takes advantages.

We have seen (*q*) that from the date of the contract the purchaser is in equity the owner of the property sold, though not absolutely, but subject to the condition that the contract be specifically enforceable. The lands sold are in equity *his* lands; he can sell, charge or devise them; if of inheritance, they are his real estate descendible to his heir, and are applicable as such for payment of his debts (*r*). He therefore bears all losses and takes the advantage of all additions or improvements which casually happen or are made to the property after that date. Thus, if after the signing of the contract, but before its completion, a house or any other building erected on the land sold be accidentally destroyed by fire, the purchaser remains none the less liable to perform the contract without any abatement of the price, and this liability may be enforced, not only at law but by a decree for specific performance in equity (*s*). The same rule is applicable if the lands sold be devastated by

(*n*) *Acland* v. *Gaisford*, 2 Madd. 28, 32; *Phillips* v. *Silvester*, L. R. 8 Ch. 173, 176-178. It should be noted that the vendor's equitable lien on the land sold for unpaid purchase money continues after he has let the purchaser into possession or executed a conveyance to him, without receiving payment of the whole or part of the price; see below, Chap. XVIII. § 1.

(*o*) Above, pp. 27, 43, 47.

(*p*) Above, p. 46.

(*q*) Above, pp. 480, 481, and notes (*e*), (*f*), (*h*).

(*r*) *Paine* v. *Meller*, 6 Ves. 349, 352; *Seton* v. *Slade*, 7 Ves. 265, 274; *Broome* v. *Monck*, 10 Ves. 597, 614, 620, 621; Lord Cairns, *Shaw* v. *Foster*, L. R. 5 H. L. 321, 338.

(*s*) *Paine* v. *Meller*, 6 Ves. 349, 352; *Rayner* v. *Preston*, 18 Ch. D. 1. This is undoubtedly so in the case of an absolute sale; but if persons contract on such terms that the continued existence of the object of the contract is a condition precedent to the performance of the agreement, they are discharged from their respective obligations by the destruction of the object without their fault: *Taylor* v. *Caldwell*, 3 B. & S. 826; and see *Counter* v. *Macpherson*, 5 Moore, P. C. 83, 104, 105; below, Chap. XVIII. § 1.

tempest, earthquake, or volcanic eruption, or be flooded, or suffer an irruption of the sea (*t*), or lose in value by reason of a fall in prices (*u*). On the other hand, the purchaser takes the advantage of all improvements effected in the property sold through extraneous causes, such as any exertion of natural forces, the dropping of lives on sale of a reversion or remainder (*v*), the death of the incumbent on the purchase of an advowson (*x*), a general rise in the price of land, or the making of any road, railway, or other public work or undertaking, through or near the property (*y*). And it appears that if the vendor himself make permanent improvements, as by building after the contract, the purchaser will be entitled to the benefit thereof without further payment (*z*). The purchaser is also entitled in equity to all things which belong to the owner of the inheritance as against a tenant for life impeachable for waste, such as timber trees blown or cut down (*a*), or minerals gotten after the contract either by a trespasser or by the vendor otherwise than in working, up to the proper time for completion, mines or quarries open at the time of sale (*b*).

Destruction by fire pending completion of a house insured by the vendor.

In connection with the destruction of a house sold by fire occurring before the completion of the contract, it should be mentioned that, where the house has been insured by the vendor, the benefit of the policy of insurance will not pass to the purchaser under the contract for sale of the house, unless expressly

(*t*) Sug. V. & P. 291, 293, 294; Jessel, M. R., *Lysaght* v. *Edwards*, 2 Ch. D. 499, 507. The case is parallel to that of the absolute destruction before delivery and payment of the price of a particular chattel so sold as to pass the property to the purchaser: see *Taylor* v. *Caldwell*, 3 B. & S. 826, 833, 837.

(*u*) *Poole* v. *Shergold*, 1 Cox, 273.

(*v*) Above, p. 481.

(*x*) Above, p. 424.

(*y*) *Paine* v. *Meller*, 6 Ves. 349, 352.

(*z*) *Clare Hall* v. *Harding*, 6 Hare, 273, 296; *Monro* v. *Taylor*, 8 Hare, 51, 60; Sug. V. & P. 304; 1 Dart, V. & P. 248, n. (*u*), 253, 5th ed.; 286, n. (*u*), 291, 6th ed.; 294, 7th ed.

(*a*) *Poole* v. *Shergold*, 1 Cox, 273; *Magennis* v. *Fallon*, 2 Moll. 561, 591.

(*b*) See *Nelson* v. *Bridges*, 2 Beav. 239; *Brown* v. *Dibbs*, 25 W. R. 776, 37 L. T. N. S. 171; *Leppington* v. *Freeman*, 40 W. R. 348, 66 L. T. N. S. 357. As to the damages recoverable where minerals have been wrongfully gotten by wilful trespass or under a *bonâ fide* claim of title, see *Jegon* v. *Vivian*, L. R. 6 Ch. 742; *Livingstone* v. *Rawyards Coal Co.*, 5 App. Cas. 25; *Bulli, &c. Co.* v. *Osborne*, 1899, A. C. 351. As to what are open mines, see *Re Morgan*, 1914, 1 Ch. 910.

assigned to him; for the policy of insurance was altogether a collateral contract (*c*). And it should be especially noted that the benefit of a policy of insurance against fire is not, as a rule, assignable without the insurer's consent, for such policies usually take the form of a contract to indemnify the insured personally or his representatives in law, but not his assigns otherwise than by will (*d*). A vendor of land should, therefore, be very careful neither to assign to the purchaser the benefit of any existing contract of insurance against fire of any building thereon, nor to agree to hold any such policy on trust for the purchaser, except subject to the consent of the insuring office (*e*). For if the vendor make such an assignment or agreement without the consent of the office, and pending completion the house be burnt down, and he receive the insurance money and hand it over to the purchaser, or lay it out in rebuilding at the purchaser's request, he will be liable on receiving the full purchase money at the completion of the sale, to refund to the insurance office the amount paid by them (*f*); but it does not appear that he will have any cause of action to recover anything from the purchaser. And if the vendor, without having entered into any agreement with the purchaser, apply the money received under a policy of insurance against fire of a house burnt down pending completion in rebuilding or reinstating the house, it does not appear that

(*c*) *Paine* v. *Meller*, 6 Ves. 349, 352, 353; *Poole* v. *Adams*, 12 W. R. 683; *Rayner* v. *Preston*, 14 Ch. D. 297, 18 Ch. D. 1. The vendor remains entitled to recover the insurance money until the contract is executed by payment of the purchase money: *Collingridge* v. *Royal Exchange Assurance Corpn.*, 3 Q. B. D. 173.

(*d*) *Lynch* v. *Dalzell*, 4 Bro. P. C. 431; *Saddlers' Co.* v. *Badcock*, 2 Atk. 554; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560; *Castellain* v. *Preston*, 11 Q. B. D. 380; *West of England, &c. Co.* v. *Isaacs*, 1897, 1 Q. B. 226; *Phœnix Assurance Co.* v. *Spooner*, 1905, 2 K. B. 753; Bunyon on Fire Insurance, 19, 354, 355, 6th ed.; Porter on Insurance, 303, 6th ed. There is nothing in the nature of a contract of fire insurance which makes it impossible to assign over the benefit thereof; policies of marine insurance, which are equally contracts of indemnity, have always been made in favour of the insured and his assigns and have been assignable accordingly; although, of course, at common law they were only indirectly assignable by means of a power of attorney: see Arnould on Marine Insurance, i. 107, 112, 231, 234, 6th ed.; ibid. 241, 10th ed.; and see now the Marine Insurance Act, 1906, s. 50; Wms. Pers. Prop. 34, 35, and n. (*h*), 308, 309, 17th ed.

(*e*) For a form of stipulation appropriate to the case, see below, Appendix (A), General Condition 15; 1 Key & Elph. Prec. Conv. 352, 10th ed.; and see article by "H. W. E." in 54 Sol. J. 354.

(*f*) *Castellain* v. *Preston*, 11 Q. B. D. 380; *Phœnix Assurance Co.* v. *Spooner*, 1905, 2 K. B. 753.

he will be entitled to claim any increase of the purchase money on that account (*g*), and he will be equally liable to repay the amount of the insurance money to the insuring office on receiving the full price of the property sold (*h*).

Obligation of office to rebuild.

By a provision of the old Metropolitan Building Act, still remaining unrepealed, insurance offices are required, at the instance of any person interested in or entitled unto any houses or buildings damaged by fire, to cause the insurance money to be laid out in rebuilding or reinstating the same, unless within sixty days after the claim is adjusted the parties claiming the insurance money give security that the same shall be so laid out, or the money be disposed of among the contending parties to the satisfaction of the office (*i*). It has been held that the operation of this provision is general, and is not confined to houses or buildings within the limits of the metropolis (*k*); and though the correctness of this decision has been questioned in the House of Lords (*l*), it has since been followed twice in Courts of first instance (*m*). The question has also been raised whether this enactment enables any person who has an interest in the building damaged, but has no independent claim to have the insurance money applied in reinstatement,

(*g*) Above, p. 483.

(*h*) *Castellain* v. *Preston; Phœnix Assurance Co.* v. *Spooner,* ubi sup. The principle is that a contract of insurance is a contract of indemnity, and the insurer, having made good the loss, is entitled by subrogation to the rights of the insured to the benefit of any compensation which the insured has a legal claim to exact from other sources. See also *West of England Fire Insurance Co.* v. *Isaacs,* 1897, 1 Q. B. 226. It is not, however, the usual policy of insurance offices to stand upon their strict legal rights where such a course would involve hardship to the insured: see Davidson's Concise Precedents, 117, 118, n. (*b*), 18th ed.; 124, n. (*a*), 19th ed.

(*i*) Stat. 14 Geo. III. c. 78, s. 83. The person interested, desiring the insurance money to be applied in reinstatement, must make a distinct request to that effect to the insurance office; otherwise the office may pay the money to the person who effected the insurance. The office is the proper party to rebuild, and a person interested, not being the person who effected the insurance, cannot, after he has himself rebuilt, claim the insurance money by virtue of this enactment: *Simpson* v. *Scottish Union Insurance Co.,* 1 H. & M. 618. As to interpleader by the office, see *Sun Insurance Office* v. *Galinsky,* 1914, 2 K. B. 545.

(*k*) *Ex parte Gorely,* 4 De G., J. & S. 477.

(*l*) *Westminster Fire Office* v. *Glasgow, &c. Socy.,* 13 App. Cas. 699, 716.

(*m*) *Re Quicke's Trusts* (Swinfen Eady, J.), 1908, 1 Ch. 887, 893 and n. (1), but apparently without the doubt expressed in the House of Lords having been cited; *Sinnott* v. *Bowden* (Parker, J.), 1912, 2 Ch. 414, 419, notwithstanding such doubt.

to require the office to lay out the insurance money in rebuilding. On this point the balance of authority now seems to be in favour of the opinion that the persons interested in the building, though not interested in or under the policy, are entitled to require the insurance money to be laid out in reinstating the building. Thus, where a lessee under covenant with his lessor to insure in their joint names to three-fourths of the value of the premises and to apply the insurance money in reinstatement, effected such insurance, but subsequently improved the premises and effected a further insurance in his own name, it was held that by virtue of the above enactment the money payable under such further insurance must be laid out at the lessor's request in reinstating the property (*n*). But it was doubted by Lord Selborne in the House of Lords in a subsequent case whether this enactment gives a mortgagor or subsequent incumbrancer any claim to require the money paid under an insurance made by a mortgagee to be applied in reinstatement (*o*), and the doubt apparently extends to question the claim of a mortgagee to require reinstatement, where the insurance was effected by the mortgagor before the mortgage, and the mortgagor has not expressly agreed to apply the insurance money in reinstatement (*p*). Notwithstanding these doubts, however, it was

(*n*) *Ex parte Gorely*, ubi sup., as reported in 10 Jur. N. S. 1085. In the same case it was also decided that the moneys payable under a policy of insurance taken out by the lessee in his own name alone on certain trade fixtures annexed to the premises as so improved were not comprehended in the above enactment and could not be required to be laid out in reinstating the premises, but were payable to the trustee in bankruptcy of the lessee, notwithstanding that the lessee had covenanted to deliver up the demised premises at the expiration of the term *with the fixtures*, improvements and other additions, whether for the purpose of trade or otherwise. This was so held on the ground that the right of the lessor to such fixtures was a personal right depending on contract, and not a real right depending on ownership, and such fixtures would not have passed on a conveyance of the lessor's estate in the land. But it is respectfully submitted that this reason is wrong; as tenant's fixtures, even when removable by the tenant, are considered to be part of the landlord's reversion, so long as they remain affixed to the land, and would pass by any conveyance of such reversion; see *Meux* v. *Jacobs*, L. R. 7 H. L. 480, 490, 491; *Lee* v. *Gaskell*, 1 Q. B. D. 700, 702; *Leschallas* v. *Woolf*, 1908, 1 Ch. 641, 652-654; Wms. Pers. Prop. 143, 146, 17th ed. It was further considered in *Ex parte Gorely* that a mortgagee of the demised premises, as so improved, was not entitled to the moneys so payable under the insurance of the trade fixtures; see note (*p*), below.

(*o*) *Westminster Fire Office* v. *Glasgow, &c. Socy.*, 13 App. Cas. 699, 714.

(*p*) It appears that, independently of the enactment in question, a mortgagee has no right or equity to require any money received under

subsequently held by Parker, J., that the right to require reinstatement under the statute is given to the various parties interested in the building, not to those only who claim to be interested in the policy moneys, and hence a mortgagee was entitled to have the proceeds of a policy existing at the date of the mortgage laid out in reinstatement (*q*). From the rule so laid down it would follow that where a house has been insured by the vendor and is burnt down pending completion of the contract, the purchaser can under the above enactment require the insurance money to be laid out in rebuilding (*r*). But where the property sold comprises valuable buildings, the purchaser

Purchaser should himself insure against fire.

an insurance effected by the mortgagor prior to the mortgage to be applied in making good the damage done, except where the mortgagor has contracted that the money shall be so applied and the benefit of that contract in effect forms part of the mortgagee's security, as where a lessee bound by covenant with the lessor to insure and apply the insurance money in reinstatement, insures accordingly and afterwards mortgages the demised premises: see *Garden* v. *Ingram*, 23 L. J. Ch. 478; *Lees* v. *Whiteley*, L. R. 2 Eq. 143; *Sinnott* v. *Bowden*, 1912, 2 Ch. 414, 419; Wms. Conv. Stat. 156-159; and see an article by "H. W. E." in 54 Sol. J. 356, written before *Sinnott* v. *Bowden*.

(*q*) *Sinnott* v. *Bowden*, 1912, 2 Ch. 414. In that case the policy was taken out previously to a mortgage, by which the mortgagor covenanted to insure the property; and it was also considered that, as the policy was renewed after the mortgage, it was "effected under the mortgage deed" within sect. 23 (3) of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), and the mortgagee was, under that enactment also, entitled to require the insurance money to be applied in reinstatement.

(*r*) This is in accordance with the view expressed in 1 Dart, V. & P. 197, 6th ed. (cf. 193, 7th ed.), before the case of *Westminster Fire Office* v. *Glasgow, &c. Socy.* But it is there suggested that, unless the vendor expressly stipulate that, as regards all insurable loss or damage, the property shall be at the sole risk of the purchaser, as from the date of the contract, the vendor is liable to have the insurance money applied against his will at the purchaser's request in rebuilding and yet to refund the amount of the insurance money to the office on completion. It is, however, submitted that, although the above enactment is now held to enable a person, interested in the building burnt but having no independent claim on the insurance money or its application, to require the office to lay out the money in reinstatement, in such case there is in effect a statutory modification of the contract of insurance to the prejudice of the insurers. They are under a statutory duty to lay out the money in rebuilding, which discharges them from the obligation of paying the vendor. But as the vendor, having previously parted with his beneficial interest in the property insured, would derive no benefit from the reinstatement, it is submitted that the principle of subrogation would not apply, and the vendor could not be called upon to refund on completion a sum of money which was neither paid to him nor laid out on *his* property: see above, p. 482; Davidson's Concise Precedents, 117, n. (*b*), 18th ed. (but the present writer doubts the safety to the vendor of the clause there suggested; see 124, 19th ed., where the usual clause is inserted as an alternative). It is submitted that there is no necessity for the vendor to make the stipulation suggested as above in Dart, V. & P., 6th ed.

should himself insure against fire as from the date of the contract for sale, unless it be arranged with the consent of the office that he shall have the benefit of some existing insurance.

Vendor's duty to take care of the property sold.

As the result of the purchaser's equitable ownership of the property sold and the vendor's consequent trusteeship for the purchaser, the vendor is bound, while he remains in possession of the property sold, to take reasonable care to preserve the property in the same condition in which it was at the date of the contract for sale (*t*). He must use the same care that a trustee ought to use with regard to the trust property, of which he is in possession; that is to say, he must take the same care as a prudent owner would take of his own property (*u*). Thus he must cultivate the lands, if in hand, in a husbandlike manner (*v*), keep the property in a reasonable state of repair (*x*), eject disseisors and others wrongfully in possession of the property sold or any part of it (*y*), and take proper precautions against injury to the lands by trespassers (*z*); and if he fail in any of these duties, the purchaser will be entitled to an allowance by way of compensation to be deducted from the purchase money (*a*), or in case of his completing the purchase in ignorance of the vendor's breach of duty he may sue the vendor for damages for the loss sustained thereby (*b*). As a rule, the vendor is bound to execute at his own expense such repairs as are necessary in order to preserve the property sold from deterioration until the proper time for completion of the contract (*c*). We have seen (*d*), that this time is, under an open contract, the time at which a good title shall have been shown; and the vendor's obligation of keeping the property in a good state of preservation up to that time at his own expense

(*t*) Above, p. 46, and n. (*o*).
(*u*) *Wilson* v. *Clapham*, 1 J. & W. 36, 38; *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517, 537.
(*v*) *Foster* v. *Deacon*, 3 Madd. 394.
(*x*) *Binks* v. *Rokeby*, 2 Swanst. 222, 226; *Lord* v. *Stephens*, 1 Y. & C. 222; *Townsend* v. *Champernowne*, 3 Y. & C. 505, 508; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575, 588; *Royal Bristol, &c. Bdg. Socy.* v. *Bomash*, 35 Ch. D. 390, 397, 398.
(*y*) *Engell* v. *Fitch*, L. R. 4 Q. B. 659; above, p. 33; *Royal British, &c. Bdg. Socy.* v. *Bomash*, 35 Ch. D. 390, 394-397.
(*z*) *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456.
(*a*) See note (*x*), above.
(*b*) *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456.
(*c*) See note (*x*), above; *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517, 532, 534, 539.
(*d*) Above, pp. 27, 43.

appears to fall on him because until then he remains entitled as owner to the ordinary profits and must discharge the current outgoings (*e*). When the contract has fixed a particular day for completion, and completion is delayed beyond that time by reason of the title not having been made out, the vendor is bound, as a rule, to preserve the property from deterioration at his own expense until the time when the purchaser may reasonably take possession, that is, until a good title be shown (*f*). The vendor is not, however, bound to improve the property, and he should be careful not to expend money on improvements, as he will have no right to recover any sums so expended from the purchaser, unless the purchaser should have authorised such expenditure (*g*). If the state of the property sold be such that an extraordinary outlay, beyond what may properly be regarded as current outgoings, should be necessary to be made in lasting repairs in order to preserve the property from deterioration, it appears that the vendor ought to be allowed his expenses properly incurred for such purpose (*h*). If by reason of the purchaser's default in completing the contract the property remain in the vendor's possession after the time when the purchaser might reasonably have taken possession, the purchaser will not be entitled to any allowance or compensation for any deterioration which the property may have suffered since that time (*i*). If the property sold be let to yearly or other tenants, the vendor must manage the same as a prudent owner would in the interval between the making of the contract and its completion, and see that the tenants duly perform their obligations (*j*). He should not allow the rents to fall into arrear (*k*): but he may reduce them, where a prudent owner would find it necessary to

Vendor not bound to improve the property

(*e*) Above, p. 46. An absolute trustee would, of course, be entitled to be reimbursed all moneys *properly* expended in preserving the trust property, and would not be bound to pay for any repairs out of his own pocket, if he had no trust money in hand available for the purpose: see *Bridge* v. *Brown*, 2 Y. & C. C. C. 181, 191, 192; *Fazakerley* v. *Culshaw*, 19 W. R. 793; *Re De Teissier's Settled Estates*, 1893, 1 Ch. 153; *Re Montagu*, 1897, 2 Ch. 8.

(*f*) *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517, 532, 539.

(*g*) Above, p. 483.

(*h*) *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517, 532; *Phillips* v. *Silvester*, L. R. 8 Ch. 173, 176.

(*i*) *Binks* v. *Rokeby*, 2 Swanst. 222, 226; *Minchin* v. *Nance*, 4 Beav. 332.

(*j*) *Foster* v. *Deacon*, 3 Madd. 394, 395.

(*k*) *Acland* v. *Gaisford*, 2 Madd. 28, 32; *Wilson* v. *Clapham*, 1 J. & W. 36, 38; *Plews* v. *Samuel*, 1904, 1 Ch. 464.

do so (*l*). If any tenancy of lands usually let determine during the interval in question, the vendor ought to notify the vacancy so occurring to the purchaser, and unless the purchaser should express a wish that the lands should remain unlet and promise to indemnify the vendor against loss on this account in case of the purchase going off, the vendor ought to take steps to re-let the lands. And the vendor should do this, whether the tenancy expired by effluxion of time or by reason of a notice to quit served by the vendor at the purchaser's request (*m*). So, the vendor should not, as a rule, determine any existing tenancy, unless the purchaser desire it (*n*).

Damages for breach of covenant.

Where the property is at the time of sale subject to a lease containing repairing or other lessee's covenants, questions may arise as to the rights of the purchaser in respect of breaches of covenant either existing at the time of the sale, or committed after the sale and before completion. We have seen that an assignment of the reversion does not impliedly pass the right to sue for breaches of covenant committed before the assignment, but such right must be expressly assigned to the purchaser in order to enable him to enforce it (*o*). It is thought that where breaches of such covenants are committed after the sale, the purchaser is, as a rule, entitled in equity to the benefit of the covenants, and to any damages recovered thereunder; for the benefit of the lessee's obligations under the lease is a part of the property, of which he has become the equitable owner by the sale; and the vendor is a trustee of such obligations as from the date of the sale, and ought to see that the lessee duly performs them up to the time for completion (*p*). But where a house subject to a repairing lease about to expire is sold *with possession*, and completion of the purchase is fixed for a day on which the lease will have expired, it is considered that what is sold is the house independent of the lease, and that if the vendor in the interval between sale or completion recover or receive from the lessee a sum of money as damages or compensation for breach of the repairing covenants, he is entitled to retain it for his own benefit (*q*).

(*l*) *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517, 537.
(*m*) *Egmont* v. *Smith*, 6 Ch. D. 469; and see *Bennett* v. *Stone*, 1902, 1 Ch. 226, 237, affirmed, 1903, 1 Ch. 509.
(*n*) *Raffety* v. *Schofield*, 1897, 1 Ch. 937, 944, 945.
(*o*) Above, pp. 387, 388. (*p*) See above, pp. 481-483, 489.
(*q*) *Re Lyne Stephens and Miller's Contract*, 1920, 1 Ch. 472.

When a sale of land is not actually completed, under an open contract at the proper time for completion (*r*), or otherwise on the day fixed for completion (*s*), the vendor is entitled to remain in possession until the sale is actually completed by payment of the purchase money (*t*), whether the delay in completion be due to the state of the title or to the purchaser's default in payment; unless, of course, the contract be that the purchaser shall have possession on a day named irrespectively of the completion of the purchase (*u*). But, as we have seen (*v*), when the purchase is not completed at the proper time or appointed day, the purchaser is entitled to the rents and profits, and is bound to pay interest on the purchase money, if he bought under an open contract, from the time when a good title was shown and verified (*x*); if he bought under a contract fixing a day for completion, but not expressly providing for payment of interest, from that day, where the delay is attributable to his own fault, and otherwise from the time when he took or might safely have taken possession; and if he bought under a contract to pay interest on failure *from any cause whatever* to complete on the appointed day, as from that day. In such cases, therefore, the vendor must account to the purchaser for the rents and profits received by him from the date when the purchaser so became entitled to them until the date of actual completion, and the amount so received must be deducted from the amount of purchase money and interest payable (*y*). In taking such account the vendor is, as a rule, chargeable only with the amount of the rents actually received by him or for his use (*z*): but he may in a special case be chargeable with the amount which, but for his wilful default, he might have received, as where he has allowed the rents to fall into arrear (*a*),

Vendor entitled to retain possession until actual completion.

Vendor's liability to account for the rents.

(*r*) Above, pp. 27, 43.
(*s*) Above, p. 52.
(*t*) Above, p. 482.
(*u*) See *Gedye* v. *Montrose*, 26 Beav. 45.
(*v*) Above, pp. 47, 54, 61, 62.
(*x*) See above, pp. 43, 47, 152, n. (*o*), 155, n. (*d*), where it is respectfully maintained that the decision of Parker, J., in *Halkett* v. *Dudley*, 1907, 1 Ch. 590, 606, was erroneous.
(*y*) See *M'Namara* v. *Williams*, 6 Ves. 143; *Plews* v. *Samuel*, 1904, 1 Ch. 464.
(*z*) *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517; Seton on Judgments, 2182, 7th ed.; *Bennett* v. *Stone*, 1902, 1 Ch. 226, affirmed, 1903, 1 Ch. 509.
(*a*) *Wilson* v. *Clapham*, 1 J. & W. 36; and see *Plews* v. *Samuel*, 1904, 1 Ch. 464, where rent was in arrear at the time of the sale and on the day fixed for completion, and the vendor was not allowed to

or neglected to let the land (*b*), or has wantonly abandoned the property sold (*c*).

The vendor's rights.

As we have seen (*d*), the vendor's beneficial interest in the property sold between the making of the contract for sale and its completion consists, first, in his lien for the price, involving the right to hold possession of the land sold until the whole purchase money be paid; and secondly, in his right to take the ordinary rents and profits for his own use up to the proper time for completion. As to the first of these rights, the vendor is entitled to retain possession until the whole price is paid, unless the contract contain an express or implied stipulation that the purchaser shall have possession on a particular day without making such payment (*e*). And where the contract provides, as upon a sale by auction under the usual conditions (*f*), that the balance of the purchase money shall be paid on a particular day, and also that possession shall be taken by the purchaser on that day, it is held that such possession is intended as may safely be taken on the one hand and given on the other, and time is not, as a rule, of the essence of the contract; and as the purchaser is not bound to take possession until he can safely do so, that is, until a good title has been shown and verified, so the vendor cannot be compelled to deliver up possession without receiving payment of the whole price (*g*). If, however, the contract provide, in such manner that time is either expressly or impliedly of the essence of the stipulation, that possession

appropriate moneys received by him from the tenant after that day (when the purchaser became entitled to the rents) in discharge of the arrears due before that day.

(*b*) *Bennett* v. *Stone*, 1902, 1 Ch. 226, 237.

(*c*) *Phillips* v. *Silvester*, L. R. 8 Ch. 173; Seton on Judgments, 2173, 2174, 7th ed. In that case there certainly appears to have been such wanton negligence on the vendors' part as justified a decree against them on the footing of wilful default; but Lord Selborne's remarks, comparing the position of a vendor retaining possession until completion to that of a mortgagee in possession, are directly opposed to the grounds of the decision in *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517. It is submitted that these remarks of Lord Selborne were not necessary to his decision and are not good law, although, in other respects the decision appears to have been right. See 2 Dart, V. & P. 650, 651, 5th ed.; 733-735, 6th ed.; 673-675, 7th ed.; *Royal Bristol, &c. Bldg. Socy.* v. *Bomash*, 35 Ch. D. 390, 397, 398; *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456.

(*d*) Above, pp. 481, 482.

(*e*) Above, p. 491; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506.

(*f*) Above, pp. 52, 61, 66, 67.

(*g*) *Tilley* v. *Thomas*, L. R. 3 Ch. 61; *Phillips* v. *Silvester*, L. R. 8 Ch. 172, 176-178.

shall be given to the purchaser on a certain day, the purchaser is entitled to take possession on that day without paying the purchase money (*h*).

Vendor's right to the profits.

The profits which the vendor is entitled to take up to the proper time for completion are the ordinary current profits arising in the course of the proper management of the estate —those which a tenant for life impeachable for waste would be entitled to take as against the remainderman (*i*). Thus, if the land sold be in hand, the vendor is entitled to gather in the crops in the due and proper course of husbandry, and to dispose of them for his own benefit (*k*); and if the land be let, he is entitled to receive the rents as they become payable (*l*). And, usually by express contract (*m*), but, if not, under the Apportionment Act, 1870 (*n*), he is entitled to an apportioned part, up to the proper time for completion, of the current rents which will become payable after that time. So the vendor may work mines and quarries open at the time of sale (*o*). But he is not otherwise entitled to take any profit or benefit which

(*h*) *Gedye* v. *Montrose*, 26 Beav. 45.

(*i*) This comparison appears to be correct as a general rule. But it has been held, where a manor containing copyholds was sold by order of the Court of Chancery and copyhold tenants died or alienated before the date on which it was ordered that the purchaser should be let into possession, but the admissions so rendered necessary were not granted until after such date, that the fines upon such admissions were to be considered as having accrued before that date and were therefore payable to the vendor: *Garrick* v. *Camden*, 2 Cox, 231. And it has been said that the same principle is applicable on a sale made out of Court: *Cuddon* v. *Tite*, 1 Giff. 395, where, however, the admission was taken before the date fixed for completion. It is submitted that the principle laid down in *Garrick* v. *Camden* is anomalous and ought not to be followed in a case where copyholders have died or alienated in the lifetime of a tenant for life of the manor, but the admissions consequent thereon have not been granted until after his death. For it is well settled that, as between copyholder and lord, no fine is due until admittance, and admittance is the act of the lord for the time being and is compellable by him: *Hobart and Hammond's case*, 4 Rep. 27b; *R.* v. *Hendon*, 2 T. R. 484; *Graham* v. *Sime*, 1 East, 632; *R.* v. *Wellesley*, 2 E. & B. 924; *Monckton* v. *Payne*, 1899, 2 Q. B. 603; 1 Wat. Cop. 317, 346, 347, 7th ed.; 1 Scriv. Cop. 111, 118, 283, 3rd ed.

(*k*) *Webster* v. *Donaldson*, 34 Beav. 451, 11 Jur. N. S. 404; it appears from the latter report that the stipulation that the growing crops should be included in the sale was held to be controlled by the provision that the purchaser should be entitled to the profits only as from the day fixed for completion.

(*l*) Above, p. 46, and n. (*m*); see *Plews* v. *Samuel*, 1904, 1 Ch. 464; above, p. 491, n. (*a*).

(*m*) Above, pp. 61, 67.

(*n*) Stat. 33 & 34 Vict. c. 35, s. 2.

(*o*) Above, p. 483, and n. (*b*).

forms part of the inheritance (*p*), and if he diminish the value of the inheritance by committing any voluntary waste, as by felling timber or working an unopened mine, the purchaser may claim compensation for the damage; or, if the waste be such as affects a material alteration in the property sold (for example, the felling of ornamental timber), the purchaser may repudiate the contract altogether (*q*). It appears that if the purchaser sue for specific performance of the contract, he may obtain an injunction restraining the vendor from the commission, pending completion, of any act tending to destroy or depreciate the inheritance of the land sold (*r*). Thus, on the sale of an advowson, if the church becomes vacant pending completion, the vendor may be restrained from presenting his own nominee to the living (*s*). And the vendor may be so restrained from selling the land to another, or from making any disposition of the legal estate therein to the prejudice of the purchaser (*t*). And on the same principle it would appear that the vendor may be restrained from wasting the property sold pending completion. But if the vendor dispute the fact that any contract for sale was made as alleged by the purchaser, the Court will not grant an injunction restraining the vendor from the exercise of any of his legal rights of ownership, unless the balance of convenience be obviously in favour of such a course (*u*).

Vendor remaining in possession after the date fixed for completion.

If, as is frequently the case, there be a day fixed for completion and a contract to pay interest on failure to complete on that day, either from any cause whatever or from any other cause than the vendor's wilful default, and the vendor remain in possession after the time fixed for completion because a good title has not yet been shown, he ought, as we have seen (*x*), to cultivate the land sold, gather in the crops, and generally manage the property with the care of a prudent owner, but

(*p*) Above, p. 483.

(*q*) *Magennis* v. *Fallon*, 2 Moll. 561, 590; 1 Dart, V. & P. 248, 441, 5th ed.; 286, 507, 6th ed.; 290, 519, 520, 7th ed.

(*r*) See *Shrewsbury and Chester Rail. Co.* v. *Shrewsbury and Birmingham Rail. Co.*, 15 Jur. 548, 550; *Hadley* v. *London Bank of Scotland*, 3 De G., J. & S. 63, 70, 71; *London & County Bank* v. *Lewis*, 21 Ch. D. 490; Sug. V. & P. 228, 229.

(*s*) *Nicholson* v. *Knapp*, 9 Sim. 326; above, p. 424, and n. (*l*).

(*t*) *Echliff* v. *Baldwin*, 16 Ves. 267; *Curtis* v. *Buckingham*, 3 V. & B. 168; *Spiller* v. *Spiller*, 3 Swanst. 556.

(*u*) *Turner* v. *Wight*, 4 Beav. 40; *Hadley* v. *London Bank of Scotland*, 3 De G., J. & S. 63.

(*x*) Above, pp. 488-491.

must account to the purchaser for the profits from the time fixed for completion until the date of actual completion, receiving instead interest on the purchase money. And where he is in actual occupation of any part of the property, he is chargeable with a fair occupation rent (*y*). During this period the outgoings, including the expenses of cultivation or management, fall upon the purchaser in the absence of express stipulation to the contrary, and the vendor is entitled to charge them against the purchaser in account (*z*). But if the vendor so remain in possession after he has shown such a title as the purchaser ought to accept, because of the purchaser's default in completing the contract, the vendor will not be liable for any subsequent deterioration of the property sold, though he must, of course, still account for the rents and profits until the actual completion of the sale (*a*). Where, however, completion is delayed by the purchaser's default, and the vendor is, on that account and to his own inconvenience, obliged to remain in actual occupation of any part of the property sold, the vendor will not be charged with any occupation rent therefor, and the purchaser is nevertheless liable to discharge the outgoings and to pay interest (*b*).

Outgoings.

Deterioration.

(*y*) *Dyer* v. *Hargrave*, 10 Ves. 505, 511; *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517, 532, 533, 538, 539; above, p. 47. It appears, however, that in an action for specific performance of a contract under which the vendor has so remained in actual occupation of the land sold, the order should direct an inquiry whether he has so occupied, and if so, that an annual value by way of rent should be set thereon: *Sherwin* v. *Shakspear*, 5 De G., M. & G. 517, 538, 539; Seton on Judgments, 2178, 7th ed. If this be omitted the vendor cannot be charged with an occupation rent under the usual order for an account of the rents and profits received by him or for his use (see above, p. 491); but where the land so occupied is in cultivation, he is chargeable with the proceeds of crops sold, less the expenses of realizing the same: *Bennett* v. *Stone*, 1902, 1 Ch. 226, 237, 238, affirmed, 1903, 1 Ch. 509.

(*z*) Above, pp. 482, 489; *Barsht* v. *Tagg*, 1900, 1 Ch. 231, 235; *Bennett* v. *Stone*, 1902, 1 Ch. 226; 1903, 1 Ch. 509. But the vendor cannot, under the account usually directed in actions for specific performance of rents and profits received by or for him (not upon the footing of wilful default), charge the purchaser with losses incurred in carrying on farming business on a farm which was let at the date of the contract, but afterwards fell vacant and was occupied and farmed by the vendor: *Bennett* v. *Stone*, ubi sup.

(*a*) Above, pp. 489, 490; *Bennett* v. *Stone*, 1902, 1 Ch. 226, affirmed, 1903, 1 Ch. 509.

(*b*) *Dakin* v. *Cope*, 2 Russ. 170. This is the case, although the vendor continue to carry on for his own benefit a business, in which he was engaged on the land sold, but which was not included in the sale. In such case he is not liable to account for his profits, and cannot charge the purchaser with his losses in respect of such business during the above period of his occupation of the premises; *Leggott* v. *Metropolitan Ry. Co.*, L. R. 5 Ch. 716.

Sale of land with the business carried on there as a going concern.

And where land is sold together with the goodwill of a business carried on there as a going concern, and by reason of the deliberate default of the purchaser the contract is not completed on the day fixed for completion, the vendor is entitled, apart from any express provision in the contract to that effect, to carry on the business at the risk of the purchaser, and to be indemnified by him in respect of losses so incurred, provided that he inform the purchaser promptly of what he is doing and that the business is being carried on at a loss (*c*). But if the vendor neglect or omit to give notice to the purchaser that he is so carrying on the business, he will not, as it appears, be able to charge the purchaser with the losses incurred (*d*).

The vendor's duty to discharge the outgoings.

As we have seen (*e*), the vendor is, usually by express contract, but if not, by law, liable to discharge all outgoings payable in respect of or charged upon the property sold up till the time for completion of the purchase, and this obligation appears to be correlative to his right to enjoy the profits up till that time. He must therefore pay out of his own pocket all rates, taxes, tithe rent-charge and rent (whether quit-rent of freeholds or copyholds or rent of leaseholds sold) accruing due in respect of the property sold before the time for completion of the purchase; also all ordinary expenses of cultivating or managing the property and keeping the same in a due state of preservation, including the cost of ordinary repairs (*f*). The outgoings so payable by the vendor also include all sums of

(*c*) *Golden Bread Co.* v. *Hemmings*, 1922, 1 Ch. 162, 170-172.

(*d*) *Dakin* v. *Cope*, 2 Russ. 170, as to which see *Golden Bread Co.* v. *Hemmings*, 1922, 1 Ch. 162, 173. Whenever land is sold, together with a business carried on there as a going concern, express stipulations should always be made, in the vendor's interest, that time shall be of the essence of the contract as regards the date fixed for completion; that the business shall be carried on and the profits thereof taken and outgoings discharged up to that date by and for the benefit of the vendor, and after that date by and for the benefit of the purchaser; that if by reason of the purchaser's neglect or default the contract shall fail to be completed on that date, the vendor shall have the option either of insisting on the performance of the contract or of treating it as broken; and that, if the vendor shall elect to insist on the performance of the contract, the vendor shall as from that date carry on the business on behalf and for the benefit of, but at the sole risk of the purchaser until the actual completion of the purchase, and the purchaser shall from that date until actual completion pay interest at a fixed rate on the purchase money and also a weekly allowance of a specified amount to the vendor for his trouble in so carrying on the business.

Special conditions to be made on sale of land with a business as a going concern.

(*e*) Above, pp. 46, 61, 67, 482, 489.

(*f*) *Carrodus* v. *Sharp*, 20 Beav. 56; above, p. 489.

money which, before the time for completion, have become charged by statute upon the property sold or recoverable by distress or otherwise from the owner or occupier thereof for the time being (*g*); and this is the case whether the vendor have expressly contracted to discharge the outgoings or not (*h*). Thus, it has been held that the vendor must pay the expenses so charged on the property sold of paving, draining, or lighting the adjoining street under a local Improvement Act (*i*), the Public Health Act, 1875 (*j*), or the Private Street Works Act, 1892 (*k*), or of removing a dangerous structure under the Metropolitan Building Acts, 1855 and 1869 (*l*), or the London Building Acts, 1894 and 1898 (*m*); and the same law seems applicable to the cost of abating a nuisance under the Public Health (London) Act, 1891 (*n*). Outgoings so charged by statute upon the land sold, whether by express words or impliedly by reason of their being recoverable by distress upon or other process of law against the land, are payable by the vendor if the statutory charge arise before the time for completion, even though the money secured by the charge should not become actually payable until after that date (*o*); and if the purchaser be obliged to pay the same after completion, he can recover the amount from the vendor either under an *express* stipulation in the contract for sale that the vendor shall discharge the outgoings up to the time fixed for completion (*p*), or under the covenant against incumbrances implied by statute (*q*) in

(*g*) Above, pp. 46 and n. (*p*), 165-167; *Stock* v. *Meakin*, 1900, 1 Ch. 683; *Stockdale* v. *Ascherberg*, 1904, 1 K. B. 447, 449.

(*h*) *Re Bettesworth and Richer*, 37 Ch. D. 535; *Barsht* v. *Tagg*, 1900, 1 Ch. 231, 234, 235.

(*i*) *Midgley* v. *Coppock*, 4 Ex. D. 309.

(*j*) *Re Bettesworth and Richer*, 37 Ch. D. 535; and see *Re Allen & Driscoll's Contract*, 1904, 2 Ch. 226; *Millard* v. *Balby, &c. Council*, 1905, 1 K. B. 60; *East Ham Council* v. *Aylett*, 1905, 2 K. B. 22.

(*k*) *Stock* v. *Meakin*, 1900, 1 Ch. 683; see *West Ham Corpn.* v. *Sharp*, 1907, 1 K. B. 445, as to the powers of enforcing the charge given by this Act.

(*l*) *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74.

(*m*) *Re Highett and Bird's Contract*, 1902, 2 Ch. 214; 1903, 1 Ch. 287; as to which case, see above, p. 344.

(*n*) *Barsht* v. *Tagg*, 1900, 1 Ch. 231, 234, 235.

(*o*) As to the times when the charges given by the above-mentioned Acts attach, see the cases cited in the six preceding notes. As to the nature and amount of a charge under the Public Health Act, 1875, see *Croydon Rural Dist. Council* v. *Betts*, 1914, 1 Ch. 870.

(*p*) *Midgley* v. *Coppock*, 4 Ex. D. 309; *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74.

(*q*) Stat. 44 & 45 Vict. c. 41, s. 7.

the conveyance (*r*). Where such outgoings are not so charged by statute upon the property sold, but are merely recoverable by suing the owner thereof for the time being personally, it appears that the vendor ought to pay them if they fall due before the time for completion; but if he do not, and the purchaser be obliged to pay, the amount paid cannot be recovered from the vendor after completion under a covenant by him against incumbrances, as there is no liability affecting the land (*s*). It appears, however, that the purchaser is entitled to refuse to complete the contract until such outgoings are paid (*t*), and that he can recover any money which he is obliged to pay on this account after completion if the contract for sale contained an express stipulation that the vendor should discharge all outgoings up to the time fixed for completion (*u*). If, however, the contract for sale contain no such express stipulation and be completed without the vendor discharging such outgoings, it is a question whether the purchaser, being subsequently obliged to pay them, has any remedy to recover the amount expended from the vendor (*x*).

The purchaser's duty to discharge outgoings.

The extent of the duty of the purchaser to discharge outgoings follows from the rule applicable to the vendor. When upon the date for completion the right to receive the profits passes to the purchaser he becomes liable as from the same date to discharge the outgoings; and these will be all the outgoings

(*r*) *Stock* v. *Meakin*, 1900, 1 Ch. 683.
(*s*) *Egg* v. *Blayney*, 21 Q. B. D. 107.
(*t*) See *Re Bettesworth and Richer*, 37 Ch. D. 535.
(*u*) *Midgley* v. *Coppock*, 4 Ex. D. 309; *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74.
(*x*) See *Egg* v. *Blayney*, 21 Q. B. D. 107, where it seems that the vendor ought to have paid the amount claimed as outgoings; but the only point argued and decided was that the purchaser could not recover under the vendor's covenant against incumbrances. *Quære* whether, when land is sold under an open contract, the contract is so entirely merged in the conveyance as to prevent the purchaser from recovering after completion outgoings which the vendor ought to have, but has not paid, under the implied stipulation that the vendor shall discharge all outgoings up to the time for completion. This stipulation is not in any way carried out, nor is the object thereof performed by the conveyance of the property to the purchaser; it would certainly survive if put into *express* words. Why, then, should it be extinguished merely because it is implied by law? See *Palmer* v. *Johnson*, 13 Q. B. D. 351, 356, 357, 359. In *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456, an action was successfully maintained by a purchaser against a vendor after completion for a breach before completion of the vendor's implied duty to take proper care of the land sold: above, p. 488. And see below, Chap. XVIII. § 1.

which in accordance with the cases just cited do not fall upon the vendor.

Apportionment of outgoings.

As we have seen (*y*), contracts for the sale of land usually contain an express stipulation that the outgoings shall, if necessary, be apportioned between the vendor and purchaser up to the time fixed for completion. Where this is the case, all such outgoings as in their nature extend over and are attributable to a definite period of time, such as yearly taxes or half-yearly rates, should, it appears, be apportioned, even though they may not be apportionable by law (*z*). If the contract contain no such stipulation, such outgoings only can be apportioned between the parties as are apportionable by law (*a*).

Purchaser taking possession before completion.

If the purchaser take possession of the property sold before completion of the contract, either in pursuance of a stipulation to that effect expressed or implied in the contract or with the vendor's consent given after the contract, he will, unless the contrary be expressly agreed, as from the time of his entry into possession, be entitled to take the ordinary rents and profits for his own use, and be liable to bear the outgoings and to pay interest on the purchase money (*b*). But as we have seen (*c*), where there is no express contract to pay interest, the purchaser may, in case of delay attributable to the vendor in completing the purchase, discharge himself from his liability to pay interest by appropriating his money to the purchase and giving the vendor notice of such appropriation. Where the purchaser is so let into possession before completion, the vendor, of course, retains his legal estate in the property sold until he parts with

(*y*) Above, pp. 61, 67.

(*z*) See *Lawes* v. *Gibson*, L. R. 1 Eq. 135, as to rent before the Apportionment Act, 1870 (it is presumed that a stipulation for apportionment was implied from the contract to *clear* the outgoings); *Midgley* v. *Coppock*, 4 Ex. D. 309, 313.

(*a*) *Midgley* v. *Coppock*, 4 Ex. D. 309, 313. And see below, Chap. XII. § 4, as to apportionment of the outgoings.

(*b*) *Powell* v. *Martyr*, 8 Ves. 146, 149; *Fludyer* v. *Cocker*, 12 Ves. 25; *A.-G.* v. *Christ Church*, 13 Sim. 214; *Birch* v. *Joy*, 3 H. L. C. 565, 591; *Ballard* v. *Shutt*, 15 Ch. D. 122; *Fletcher* v. *Lancashire, &c. Rail. Co.*, 1902, 1 Ch. 901, 908. Cp. *Allen* v. *Inland Revenue Commissioners*, 1914, 1 K. B. 327, 337, 2 K. B. 327, where purchasers who were paying their purchase money by instalments and had entered into possession before conveyance were held to be "owners for the time being" so as to be liable to be assessed to undeveloped land duty (now abolished) under sects. 19, 41 of the Finance (1909-10) Act, 1910 (10 Edw. VII. c. 8).

(*c*) Above, pp. 47, 61, 62.

it by conveyance to the purchaser; but his only beneficial interest in the property sold is his equitable lien for the price, and in equity he holds his legal estate as security only for payment of the purchase money (*d*). In equity, the purchaser is the owner of the property, subject to the vendor's lien and to the condition that a good title shall be shown (*e*). It appears, therefore, that in such case the purchaser is, as a rule, entitled to exercise all ordinary acts of ownership over the property sold; for the very purpose of putting the purchaser into possession is to enable him to act as owner (*f*). But he may be restrained by injunction from the commission or continuance of any such act of waste as will depreciate the vendor's security for payment (*g*). In this respect the purchaser's position resembles that of a mortgagor in possession (*h*). If the purchaser take possession before completion without the vendor's leave, he may be ejected and restrained by injunction from re-entry, or from the commission of waste, as a mere trespasser may (*i*). The question to what extent the purchaser's entry into possession before completion may be a waiver of objection to the title has already been considered (*j*).

Purchaser already in possession as vendor's tenant.

If at the date of the contract for sale the purchaser be in possession of the property sold as tenant to the vendor from year to year or for any other term, and the contract is subject to the usual condition that the vendor shall show a good title, the tenancy is not determined at law pending completion of the contract (*k*); though in equity the purchaser, of course, has the rights incident to his position under the contract (*l*). And it appears that in such case, in the absence of stipulation to the contrary, the purchaser will be entitled to the rents and profits and liable to pay interest on the purchase money as from the date of the contract, notwithstanding that the contract be con-

(*d*) *Smith* v. *Hibbard*, 2 Dick. 730; *Ecclesiastical Commrs.* v. *Pinney*, 1899, 2 Ch. 729; 1900, 2 Ch. 736.
(*e*) Above, pp. 480-482.
(*f*) *Burroughs* v. *Oakley*, 3 Swanst. 159, 170.
(*g*) *Cutler* v. *Simons*, 2 Mer. 103, 105, 106.
(*h*) *Crockford* v. *Alexander*, 15 Ves. 138; *Humphreys* v. *Harrison*, 1 J. & W. 581; *King* v. *Smith*, 2 Hare, 239, 244; *Goodman* v. *Kine*, 8 Beav. 379; Wms. Real Prop. 605, 23rd ed.
(*i*) See *Crockford* v. *Alexander*, 15 Ves. 138.
(*j*) Above, pp. 176, 177.
(*k*) *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695; *Tarte* v. *Darby*, 15 M. & W. 601.
(*l*) Above, p. 480; *Daniels* v. *Davison*, 16 Ves. 249, 253.

ditional on the vendor's showing a good title (*m*). If at the date of the contract the purchaser be in possession as tenant at will to the vendor, it appears that the tenancy is determined by the contract, and that thenceforth the purchaser is to be treated as being in possession under the contract (*n*).

Orders for purchaser in possession to pay price into Court or give up possession.

If an action be brought for the specific performance (*o*) of a contract for the sale of land and the purchaser be in possession, he may be ordered, pending the trial of the action, to pay the purchase money into Court, or at his election either to pay the money into Court or to give up possession. The Court makes such orders for the preservation of the property, which is the subject of the action, considering it unjust to allow the purchaser to have both the land and the purchase money in his possession pending the trial. Thus, if the purchaser exercise any act of ownership, such as felling timber or working mines, which impairs the vendor's security for payment of the price, he will be ordered to pay the purchase money into Court without having the option of giving up possession instead; and this is the case, whether the purchaser were put into possession pursuant to the contract or with the vendor's consent given after the contract (*p*). And where the vendor has shown such a title as the purchaser ought to accept, or the purchaser has accepted the vendor's title, the purchaser being in possession will be ordered to pay the purchase money into Court (*q*). Where the purchaser being in possession has done nothing to diminish the value of the property, he will not be ordered to pay the purchase money into Court without being offered the alternative of giving up possession (*r*); but it appears that,

(*m*) *Townley* v. *Bedwell*, 14 Ves. 590, 597; *Daniels* v. *Davison*, 16 Ves. 249, 253; see *Mills* v. *Haywood*, 6 Ch. D. 196.

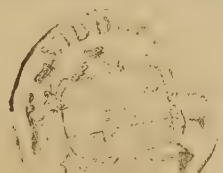
(*n*) *Daniels* v. *Davison*, 16 Ves. 249, 252, 253.

(*o*) The orders here mentioned will not be made at the instance of a vendor suing for rescission of the contract; but other proper orders for the preservation of the property in dispute may be made in such an action: *Cook* v. *Andrews*, 1897, 1 Ch. 266.

(*p*) *Dixon* v. *Astley*, 19 Ves. 564, 1 Mer. 133; *Cutler* v. *Simons*, 2 Mer. 103; *Bradshaw* v. *Bradshaw*, ib. 492; *Bramley* v. *Teal*, 3 Madd. 219; *Pope* v. *Great Eastern Rail. Co.*, L. R. 3 Eq. 171; *Lewis* v. *James*, 32 Ch. D. 326, 330.

(*q*) *Bradshaw* v. *Bradshaw*, 2 Mer. 492, 493; *Crutchley* v. *Jerningham*, ib. 502; *Wood* v. *Edwards*, 1876, W. N. 15.

(*r*) *Greenwood* v. *Turner*, 1891, 2 Ch. 144; and if he give up possession, he must pay interest on the balance of the purchase money from the date for completion for the remainder of the period of possession:



where he has been let into possession with the vendor's leave but not under the contract, he will, as a rule, be ordered to elect within a specified time whether he will pay the money into Court or give up possession, notwithstanding that a good title has not yet been shown (*s*), unless there be delay in making out the title attributable to the vendor's *laches* (*t*). Where the purchaser has been put into possession pursuant to the contract for sale, the Court will not, in general, so put him to his election (*u*). And where the purchaser's right to possession is referable to some other title than that conferred by the contract or the vendor's leave given after the contract, as where he entered under a lease granted to him prior to the sale, there appears to be no ground for requiring him to elect as above mentioned (*v*).

§ 2.—*Of the transfer pending completion of the rights and liabilities under the contract.*

Transfer pending completion of the rights and liabilities under the contract.

We will now consider the effect of the transfer of the rights and liabilities created by the contract pending the completion thereof. This may take place either involuntarily, which is mainly by act of law, or voluntarily, that is, by act of the parties. The former case occurs upon the death, bankruptcy or personal incapacity supervening since the contract of either party thereto, and on the land sold being taken in execution of a judgment against the vendor; the latter upon the assignment *inter vivos* by either party of his rights under the contract. We will consider each of these cases in turn, first, as regards the vendor, and, secondly, with respect to the purchaser, premising that the contract, once validly concluded, is not avoided by the death, bankruptcy, or supervening incapacity of either party

S.C., followed with hesitation by Astbury, J., in *Re Cassano and Mackay's Contract*, 1920, W. N. 7, where such interest was ordered to be paid into Court.

(*s*) *Clarke* v. *Wilson*, 15 Ves. 317; *Gibson* v. *Clarke*, 1 V. & B. 500; *Smith* v. *Lloyd*, 1 Madd. 83; *Wickham* v. *Evered*, 4 Madd. 53; *Younge* v. *Duncombe*, Younge, 275; *Tindal* v. *Cobham*, 2 My. & K. 385; *Fowler* v. *Ward*, 6 Jur. 547.

(*t*) *Fox* v. *Birch*, 1 Mer. 105.

(*u*) *Gibson* v. *Clarke*, 1 V. & B. 500, 501; *Morgan* v. *Shaw*, 2 Mer. 138; *Gell* v. *Watson*, 3 Madd. 225; *Pryse* v. *Cambrian Rail. Co.*, L. R. 2 Ch. 444.

(*v*) *Bonner* v. *Johnston*, 1 Mer. 366; *Freebody* v. *Perry*, G. Coop. 91. Note that in *Greenwood* v. *Turner*, 1891, 2 Ch. 144, the lease under which the purchaser claimed to be in possession had expired at the time of the motion.

thereto, and remains, as a rule, enforceable not only at law but specifically in equity at suit of either party thereto, his representatives in law or assigns, against the other party or his representatives in law (*x*). The contract is also specifically enforceable against the vendor's assigns *inter vivos* of the land other than those who have taken the legal estate therein as purchasers in good faith for valuable consideration actually paid or executed without notice of the contract (*y*).

Death of the vendor.

On the vendor's death, his rights under the contract pass to his executors or administrators, who are the proper persons to sue upon the contract either for damages at law or for specific performance in equity (*z*). But in order to reap the benefit of the contract, the personal representatives must, of course, procure the performance of the vendor's part of the agreement —that is, the conveyance to the purchaser of the land sold—and it is therefore necessary to consider upon what persons the vendor's estate in the land sold devolves upon his death pending completion. This depends upon the nature of the property sold. If it were freehold in fee the vendor's estate therein formerly passed, on his death before completion, to his heir or devisee, according as he had left the same to descend or disposed thereof by his will; and the heir or devisee was obliged to convey the estate to the purchaser (*a*). The vendor's estate would not only go to a specific devisee thereof, but might also pass under a general devise of all his real estate, if the purposes

Devolution of the vendor's estate.

Freeholds in fee.

(*x*) *Baden* v. *Pembroke*, 2 Vern. 213; *Owen* v. *Davies*, 1 Ves. sen. 82; *Hinton* v. *Hinton*, 2 Ves. sen. 631, 633; *Taylor* v. *Stibbert*, 2 Ves. jun. 437, 439; *Brooke* v. *Hewitt*, 3 Ves. jun. 253; Sug. V. & P. 175, 208; 1 Dart, V. & P. 255, 995, 996, 5th ed.; 291, 1114, 1115, 6th ed.; 296, 1029, 1030, 7th ed.; Fry, Sp. Perf. §§ 211, 212, 241, 274, 275, 3rd ed.; *Pearce* v. *Bastable's Trustee*, 1901, 2 Ch. 122.

(*y*) *Daniels* v. *Davison*, 16 Ves. 249, 17 Ves. 433; *Potter* v. *Sanders*, 6 Hare, 1; 2 Dart, V. & P. 823, 824, 996, 5th ed.; 927, 928, 1115, 6th ed.; 836, 837, 1030, 7th ed.; *Grindell* v. *Bass*, 1920, 2 Ch. 487, 493, 494; and consider *Dunn* v. *Chapman*, ib. 474, 475, 478, 481, where the vendor's assign under a subsequent sale had completed his contract, but the first purchaser had already brought an action for specific performance and registered it as a *lis pendens*.

(*z*) *Baden* v. *Pembroke*, 2 Vern. 212; *Eaton* v. *Sanxter*, 6 Sim. 517; *Roberts* v. *Marchant*, 1 Ph. 370; *Hoddel* v. *Pugh*, 33 Beav. 489; Sug. V. & P. 177; 1 Dart, V. & P. 256, 1008, 5th ed.; 293, 1130, 6th ed.; 296, 1029, 7th ed.; Fry, Sp. Perf. § 212, 3rd ed.

(*a*) The heir or devisee was a necessary party to a suit for specific performance of the contract, both on this account and as having an interest in disputing the contract: see previous note.

of such a devise were not inconsistent with this construction (*b*). If, however, the vendor had devised all his real estate generally to one, and all estates held by him upon any trust to another, it was a question how far the estate sold was held by the vendor upon a trust so as to pass under the devise of his trust estates. Where the title had been accepted prior to the vendor's death, it was held that the property was vested in him upon a trust, and so passed under a devise of his trust estates; but it appears that if the vendor had died prior to the acceptance of the title, the property sold would not have been held by him upon an absolute trust, for the contract had not yet become unconditionally binding on him, and so the land would have passed to his general devisee (*c*). Under the Land Transfer Act, 1875 (*d*), freeholds or copyholds held in fee and sold might have passed, on the vendor's death and intestacy, to his legal personal representative, if he had been a *bare* trustee thereof; but this would only have been the case where the title had been accepted and the purchase money paid (*e*). Under the Conveyancing Act, 1881 (*f*), freeholds held in fee and sold may pass, on the vendor's death before completion, to his legal personal representatives, notwithstanding any testamentary disposition thereof, if they were vested in the vendor upon a trust within the meaning of sect. 30 of that Act. This is the case if the title had been accepted and the purchase money paid before the vendor's death (*g*); and apparently it is so, if before his death the contract had become unconditionally binding on the parties by reason of the purchaser's acceptance of the title (*h*), but this point has not been precisely so decided. Under the same Act (*i*), however, where at the death of any person

(*b*) See *Wall* v. *Bright*, 1 J. & W. 494; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 510-513; 1 Jarm. Wills, 693, 703-706, 4th ed.; 647, 654-657, 5th ed.; 971, 978-980, 6th ed.

(*c*) *Lysaght* v. *Edwards*, 2 Ch. D. 499.

(*d*) Stat. 38 & 39 Vict. c. 87, s. 48, replacing 37 & 38 Vict. c. 78, s. 5 (above, p. 203), and repealed by 44 & 45 Vict. c. 41, s. 30.

(*e*) *Morgan* v. *Swansea Urban, &c. Authority*, 9 Ch. D. 582; *Re Cunningham and Frayling*, 1891, 2 Ch. 567; see *Re Cuming*, L. R. 5 Ch. 72; above, p. 203 and n. (*b*).

(*f*) Stat. 44 & 45 Vict. c. 41, s. 30; above, p. 204.

(*g*) *Re Cuming*, L. R. 5 Ch. 72.

(*h*) See *Lysaght* v. *Edwards*, 2 Ch. D. 499, 507; *Re Pagani*, 1892, 1 Ch. 236.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 4, applying only in cases of death after the 31st December, 1881, and providing that a conveyance made thereunder shall not affect the beneficial rights of any person claiming under any testamentary disposition, or as heir or next of kin of a testator or intestate.

there is subsisting a contract enforceable against his heir or devisee for the sale of the fee simple or other freehold interest descendible to his heirs general in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death in any manner proper for giving effect to the contract. Under this Act, therefore, the legal personal representatives of a vendor of freeholds in fee, or a freehold estate *pur autre vie* (*k*), who has died since the commencement of the Act, and pending completion, have been enabled to complete the contract by conveying the legal estate to the purchaser in all cases in which the vendor had in his lifetime entered into a valid contract for sale. But it is to be observed that the power of conveyance given by the 4th section of the Act depends on the existence at the vendor's death of a contract for sale *enforceable* against his heir or devisee. It seems, therefore, that the power does not arise where the contract for sale was oral only, or put into writing but not signed by the vendor (*l*), unless this objection to the enforcement of the contract should have been removed under the doctrine of part performance or otherwise (*m*). And where a conveyance has been made in pursuance of this enactment, it appears to be a necessary part of the title to prove that the power so exercised duly arose; and for this purpose production of a contract for sale, duly put into writing and signed, may, it seems, be required (*n*). As we have seen, under the Land Transfer Act, 1897 (*o*), a deceased person's freehold estate of inheritance now passes, notwithstanding any testamentary disposition thereof, to his personal representatives, as trustees for the persons by law beneficially entitled thereto. It appears, therefore, that if a vendor of freeholds in fee die since the commencement of that Act, and pending the completion of the contract, his estate therein must devolve upon his executors or administrators in any event. If the contract should have been so far performed that the vendor was, at the date of his death, an absolute trustee of the land for the purchaser, the vendor's estate appears to pass to his executors or administrators, under sect. 30 of the Conveyancing Act, 1881 (*p*); otherwise they

(*k*) Above, p. 199. (*l*) Above, p. 10.
(*m*) Above, pp. 12, 13.
(*n*) See 1 Key & Elph. Prec. Conv. 544, n., 4th ed.; 619, 620, and note (*b*), 10th ed.
(*o*) Stat. 60 & 61 Vict. c. 65, s. 1 (1); above, pp. 211, 212.
(*p*) Above, p. 504.

appear to take the estate under the Land Transfer Act, 1897 (*q*).

Estate tail.

If the vendor were seised of the property sold for an estate tail, it appears that his estate therein still passes, on his death pending completion and without having barred the entail, to the heir in tail (*r*), or if there be no such heir, to the reversioner or remainderman. And the contract is not enforceable against these persons (*s*), notwithstanding that the vendor in his lifetime could have made a good title by barring the entail (*t*), and might have been decreed to perform the contract specifically (*u*). But if the vendor, being a tenant in tail only, had entered into an absolute contract for sale of the fee simple, his death without having barred the entail causes a breach of the contract to show a good title, and for this his executors are liable in damages at law. If the tenant in tail should have contracted to sell the entailed lands in exercise of the power of sale given to him by the Settled Land Act, 1882 (*v*), and died pending completion, the contract would be enforceable against all persons entitled to the lands after his death under the settlement by virtue of which he held the same (*x*). Such a contract is quite different from a contract to exercise the power of disposition annexed by law to the ownership of his estate. In the one case the purchase money is intended to be paid, not to the vendor, but to the

Sale by tenant in tail under the Settled Land Acts.

(*q*) It appears, however, that the vendor's heir or devisee should still be made a party to any action for specific performance of the contract, as having an interest in disputing the contract: above, p. 503, nn. (*z*), (*a*); Rawlins, Sp. Perf. 83.

(*r*) Above, p. 220.

(*s*) Stat. 3 & 4 Will. IV. c. 74, s. 40; Sug. V. & P. 427; 2 Dart, V. & P. 998, 5th ed.; 1117, 6th ed.; 1032, 7th ed. As to the old law, see *A.-G.* v. *Day*, 1 Ves. 218, 224; *Frank* v. *Mainwaring*, 2 Beav. 115, 126.

(*t*) *Cattell* v. *Corrall*, 4 Y. & C. 228; see above, p. 371, n. (*s*). Here it may be noted that under stat. 3 & 4 Will. IV. c. 74, ss. 1, 15, a tenant in tail, who has by deed unenrolled conveyed away all his estate in the lands entailed, whether to a purchaser for value or to a volunteer, may nevertheless subsequently bar the entail, by a proper disentailing assurance duly executed and enrolled under the Act. In such case, if the prior conveyance were made in favour of a purchaser for valuable consideration, the subsequent assurance will (unless it were itself made to a purchaser for value not having express notice of the prior conveyance) operate to confirm the prior conveyance; see sect. 38; *Sturgis* v. *Morse*, 2 De G., F. & J. 223; *Hankey* v. *Martin*, 49 L. T. 560; Cotton, L. J., *Bankes* v. *Small*, 36 Ch. D. 716, 721; *Re Gaskell & Walters' Contract*, 1906, 2 Ch. 1.

(*u*) Sug. V. & P. 205; *Bankes* v. *Small*, 36 Ch. D. 716.

(*v*) Stat. 45 & 46 Vict. c. 38, s. 58 (1) (i).

(*x*) Sect. 31 (2).

trustees of the settlement or into Court in trust for the persons entitled under the settlement (*y*), and it is not intended to bar the entail: in the other, the vendor proposes to bar the entail and to take the purchase money for himself (*z*). It appears that an open contract to sell the fee made by a tenant in tail would be referable to the power of disposition annexed to his ownership of the estate (*a*), as the purchase money would be payable to himself.

Copyholds.

If the property sold were copyhold held for a customary estate in fee and the vendor had been admitted tenant, his estate will not pass, on his death pending completion, to his executors or administrators, either under sect. 30 of the Conveyancing Act, 1881 (*b*), or under the Land Transfer Act, 1897 (*c*), but will go to his customary heir or devisee, according as he died intestate or testate in respect thereof, pursuant to the old law formerly affecting freeholds (*d*). If the property sold were copyhold, in which the vendor had an equitable estate in fee or of which he was an unadmitted surrenderee in fee, it appears that, on his death before completion, his estate would pass to his executors or administrators if he were then a trustee thereof within the meaning of sect. 30 of the Conveyancing Act, 1881 (*e*); and if not, it would appear to pass to them under the Land Transfer Act, 1897 (*f*). The 4th section of the Conveyancing Act, 1881 (*g*), relates only to the case of the sale of the fee simple or other *freehold* interest descendible to the heirs *general*, and does not therefore apply in the case of the sale of an estate of inheritance, whether legal or equitable, in any copyhold hereditaments.

Leaseholds.

If the property sold were leaseholds for years, the vendor's estate therein would in any case pass, on his death before completion, to his executors or administrators at common law (*h*).

(*y*) Above, p. 282.
(*z*) Wms. Real Prop. 94, 103, 112-114, 23rd ed.
(*a*) See Sug. Pow. 343 *sq.*, 8th ed.; Farwell on Powers, 300, 3rd ed.
(*b*) Above, p. 204.
(*c*) Above, pp. 211, 213-222.
(*d*) Above, pp. 200, 503, 504.
(*e*) Above, pp. 204, 504.
(*f*) *Re Somerville and Turner's Contract*, 1903, 2 Ch. 583; above, p. 221.
(*g*) Above, p. 504.
(*h*) Above, p. 201.

Conversion of the land sold in the vendor's hands

As between the vendor and his own representatives after his death, the property sold, if real estate, is, as we have seen (*i*), converted into personalty as from the date of the contract for sale, provided that the contract become fully binding by the acceptance of the title. If this condition be fulfilled, the purchase money and the vendor's lien therefor belong, in case of his death before completion, to his executors or administrators as part of his personal estate (*j*): but the benefit of the vendor's right to take the rents and profits up to the proper time for completion will pass, if he die before that time, to his heir or devisee (*k*), subject to the executor's or administrator's interest therein for payment of the vendor's debts under the Land Transfer Act, 1897 (*l*). If the vendor should, prior to the contract for sale, have specifically devised the land afterwards sold, the devise—although it would, prior to the Land Transfer Act, 1897, convey the vendor's estate at law (*m*)—is in equity adeemed; so that the devisee is not entitled to the purchase money (*n*) unless a contrary intention should appear from the will (*o*). If a contract for the sale of real estate become unconditionally binding by the acceptance of the vendor's title and the vendor die pending completion, and afterwards the contract fail to be performed owing to the purchaser's default in payment of the price, the land becomes in equity the property of the persons entitled on the vendor's death to his personal estate; for they became absolutely entitled to the benefit of the vendor's lien when the contract became fully binding; and they remain entitled, on failure of the contract by the purchaser's default, to take possession of their security *in specie* (*p*). But if the

(*i*) Above, p. 481.
(*j*) Above, pp. 481, 503.
(*k*) *Lumsden* v. *Fraser*, 12 Sim. 263; 1 Dart, V. & P. 263, 5th ed.; 302, 6th ed.; 306, 7th ed.; *Watts* v. *Watts*, L. R. 17 Eq. 217.
(*l*) Above, pp. 211-213.
(*m*) Above, p. 504.
(*n*) *Moor* v. *Raisbeck*, 12 Sim. 123; *Farrar* v. *Winterton*, 5 Beav. 1; *Weeding* v. *Weeding*, 1 J. & H. 424, 431; *Watts* v. *Watts*, L. R. 17 Eq. 217; *Re Clowes*, 1893, 1 Ch. 214; Sug. V. & P. 190; 1 Dart, V. & P. 263, 5th ed.; 302, 6th ed.; 306, 7th ed. The same law is applicable where the land has been disposed of by will in exercise of a general or special power of appointment and afterwards sold: *Re Dowsett*, 1901, 1 Ch. 398; *Beddington* v. *Baumann*, 1903, A. C. 13.
(*o*) *Drant* v. *Vause*, 1 Y. & C. C. C. 580; *Emuss* v. *Smith*, 2 De G. & S. 722; *Weeding* v. *Weeding*, 1 J. & H. 424, 431; 1 Dart, V. & P. 263, 264, 5th ed.; 302, 303, 6th ed.; 306, 7th ed.; and see Sugd. Law of Property, 223.
(*p*) *Curre* v. *Bouyer*, 5 Beav. 6, n.; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506.

contract never become absolutely binding upon and specifically enforceable against both parties, as where there is a failure to show a good title on the vendor's part, or the contract is voidable *ab initio* and is avoided for fraud, misrepresentation, or any other cause (such as omission to comply with the Statute of Frauds (*q*)), there is no conversion of the property sold in the vendor's hands, and if he die, the land, which was the subject of the contract, will pass as such to the persons entitled to his lands either on his intestacy or under his will (*r*). And the like result follows where a contract for sale of lands has been rescinded or abandoned by consent of the parties in the vendor's lifetime (*s*). When a man has entered into a valid contract giving to another an option to purchase (*t*) his real estate, the property is converted into personalty in the hands of the vendor, his heirs and assigns, as from the time of the exercise of the option; and if the vendor die before that time, his heirs or assigns of the hereditaments in question are entitled to the rents and profits thereof until the option is exercised, after which, in the absence of any disposition to the contrary made by his will (*u*), his legal personal representatives are entitled to the purchase money, with interest from that time until payment, as part of his personal estate (*v*).

Option to purchase.

(*q*) Above, p. 10.

(*r*) Above, pp. 197 *sq.*; and see *Haynes* v. *Haynes*, 1 Dr. & Sm. 426; *Edwards* v. *West*, 7 Ch. D. 858, 862; 1 Jarm. Wills, 54, 5th ed.; see 78, 6th ed.

(*s*) Sug. V. & P. 191; and consider *Ridout* v. *Fowler*, 1904, 1 Ch. 658, 2 Ch. 93.

(*t*) A contract giving an option to purchase any land gives an *interest* in the land to the person who has the option, and must therefore conform with the 4th section of the Statute of Frauds (above, p. 3); see *London and South Western Railway* v. *Gomm*, 20 Ch. D. 562; above, pp. 358, 359. In order that an option to purchase any land may be well exercised, the terms of the contract, grant or devise, which created the option, must in all respects be strictly pursued, and where any particular time is specified for the exercise of the option, time is of the essence of the contract or matter: *Brooke* v. *Garrod*, 2 De G. & J. 62; *Ranelagh* v. *Melton*, 10 Jur. N. S. 1141; *Weston* v. *Collins*, 11 Jur. N. S. 190; and see *Mills* v. *Haywood*, 6 Ch. D. 196; *Bruner* v. *Moore*, 1904, 1 Ch. 305. The benefit of an option given by covenant contained in a lease to the lessee, his executors, administrators or assigns, to purchase the fee simple of the demised premises goes, after the lessee's death, to the persons becoming entitled to the lease: *Re Adams and Kensington Vestry*, 27 Ch. D. 394. As to the question how far an option to purchase must conform with the rule against perpetuities, see above, pp. 358, 359. As to the effect of a contract to give the first refusal of land, see *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, 1901, 2 Ch. 37.

(*u*) See above, p. 508, n. (*o*).

(*v*) *Lawes* v. *Bennett*, 1 Cox, 167; *Townley* v. *Bedwell*, 14 Ves.

Conveyance of deceased vendor's estate by vesting order.

As we have seen (*x*), in case of the vendor's death pending completion, a conveyance of his estate must be executed to the purchaser before the purchase money can be obtained. Such a conveyance cannot always be immediately executed by the persons on whom the vendor's estate has devolved on account of their being under disability or from other causes. In certain cases of this kind the required conveyance may be effected by vesting order made under the jurisdiction conferred by the Lunacy Act, 1890 (*y*), or the Trustee Act, 1893 (*z*). But,

590; *Weeding* v. *Weeding*, 1 J. & H. 424; *Re Adams and Kensington Vestry*, 27 Ch. D. 394, 399; *Re Isaacs*, 1894, 3 Ch. 506; *Re Marlay*, 1915, 2 Ch. 264, 275, 279, 281; *Re Blake*, 1917, 1 Ch. 18; and see an article by the late Mr. Charles Sweet in 55 Sol. J. 360.

(*x*) Above, p. 503.

(*y*) Stat. 53 Vict. c. 5. Sect. 135 enabled the Judge in lunacy to make a vesting order when a lunatic was solely or jointly seised or possessed of, or entitled to a contingent right in, any land upon trust. This jurisdiction was transferred to the High Court by stat. 1 & 2 Geo. V. c. 40, s. 1; see R. S. C. Ord. LV. r. 13B; W. N. 10 Feb. 1912.

(*z*) Stat. 56 & 57 Vict. c. 53, ss. 26-34. These enactments and those mentioned in the previous note have replaced the Trustee Acts, 1850 and 1852 (stats. 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55), which replaced 11 Geo. IV. & 1 Will. IV. c. 60; 4 & 5 Will. IV. c. 23; and 1 & 2 Vict. c. 69.

By the Trustee Act, 1893, s. 26, the High Court may make a vesting order—

(i.) Where the High Court appoints or has appointed a new trustee;

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person—

(a) is an infant, or

(b) is out of the jurisdiction of the High Court, or

(c) cannot be found;

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land;

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead;

(v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of any land and is dead;

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement.

By sect. 27, where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence, would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the

except where the contract is established by bringing an action for its specific performance, the Court will not make a vesting order as to a deceased vendor's estate under these Acts unless the contract had been so far executed in his lifetime that at the time of his death he was unquestionably an absolute trustee for the purchaser (*a*); as, for example, where the whole or the bulk of the purchase money had been paid and the purchaser let into possession (*b*). It may be observed that the construction so placed on these Acts is not inconsistent with the doctrine that the vendor is a trustee for the purchaser conditionally as from the date of the contract, and absolutely when the contract has become fully binding by the acceptance of the title (*c*). The Court, in exercising the jurisdiction conferred by these Acts, does not question this doctrine; it merely requires indisputable evidence of the vendor's absolute trusteeship before it will treat his representatives as trustees.

Death of vendor who sold under a power.

Where the owner of a power of appointment over land has contracted to sell the land in exercise of the power (*d*), and

land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

By sect. 31, where judgment is given (amongst other things) for the specific performance of a contract concerning any land, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

By sect. 32, vesting orders have the effect of a conveyance by the proper persons. By sect. 33, the Court may, in all cases where a vesting order can be made, appoint a person to convey, and a conveyance by such person shall have the same effect as a vesting order. By sect. 34, where an order vesting copyhold land is made with the consent of the lord of the manor, the land shall vest without surrender or admittance; and where a person is appointed to convey any copyhold land, he shall do all things necessary to complete the assurance thereof, and the lord of the manor shall, subject to the customs of the manor and the usual payments, admit him accordingly.

(*a*) *Re Carpenter*, Kay, 418; *Re Colling*, 32 Ch. D. 333.

(*b*) *Re Cuming*, L. R. 5 Ch. 72; *Re Pagani*, 1892, 1 Ch. 233.

(*c*) Above, pp. 481, 504, 505.

(*d*) The question whether the vendor contracted to sell in exercise of the power depends upon his intention. It is not necessary that the contract should refer to the power. Where the vendor had no estate in

dies before completion of the sale by conveyance under the power, the contract for sale is treated in equity on the same footing as a defective execution of the power, and will accordingly be specifically enforceable by the purchaser against the persons entitled to the lands in default of appointment. Thus, if the power of appointment were exercisable by deed only, and the contract for sale were made by unsealed writing, and the vendor died before conveyance, equity would supply the defect in favour of the purchaser, and would oblige the persons entitled in default of appointment to carry out the contract (*e*). But in order that a contract to exercise a power over land may be so binding on those entitled in default of appointment, it must be valid from the beginning; and it appears that a parol contract, followed by part performance by the purchaser, is not so enforceable against them (*f*), unless, with knowledge of the parol contract, they lie by and allow him to lay out money on the estate (*g*). Every contract for the sale of settled land made by a tenant for life or any person having the powers of a tenant for life under the Settled Land Act, 1882 (*h*), is binding on, and enures for the benefit of, the settled land, and is enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor, but so that it may be varied or rescinded by any such successor in the like case and manner, if any, as if it had been made by himself. And by the Settled Land Act, 1890 (*i*), a tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which, if made by such predecessor, would have been valid as against his successors in title. This enactment appears to be applicable, not only where the contract

Contracts for the sale of settled land under the Settled Land Acts.

the land, it will be presumed that he contracted to sell in exercise of his power; but where he had an estate in the land as well as the power, it is a question of construction whether he contracted to sell in exercise of the right of alienation annexed to his estate or of the power: see *Blake* v. *Marnell*, 2 Ball & Beat. 35; Sug. Pow. 201 *sq.*, 289, 343 *sq.*, 8th ed.; Farwell on Powers, 300, 3rd ed.; above, pp. 506, 507.

(*e*) *Coventry* v. *Coventry*, 1 Str. 596; *Mortlock* v. *Buller*, 10 Ves. 292, 315; *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52; Sug. Pow. 552, 563, 8th ed.; *Re Dykes*, L. R. 7 Eq. 337, 342.

(*f*) *Blore* v. *Sutton*, 3 Mer. 237; *Morgan* v. *Milman*, 3 De G., M. & G. 24, 33.

(*g*) *Stiles* v. *Cowper*, 3 Atk. 692; *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52, 72, 73.

(*h*) Stat. 45 & 46 Vict. c. 38, ss. 31 (1), (2), 58.

(*i*) Stat. 53 & 54 Vict. c. 69, s. 6.

was made in exercise of some power conferred by the Settled Land Acts, but in all other cases where the contract binds the contractor's successors in estate; for example, where one seised of lands in fee has sold them, and died pending completion, having devised the lands to another for life with remainder over. But in these circumstances, if the vendor died after the commencement of the Land Transfer Act, 1897 (*j*), the purchaser could not safely take a conveyance from the tenant for life under the will, except where the real estate sold was not affected by this Act, as in the case of copyholds (*k*), for the effect of the Act is to prevent any legal estate from passing to the devisees, and in equity the devise, if made prior to the sale, would be revoked thereby (*l*).

Devolution of the burthen of the contract on the vendor's death.

If the vendor die pending completion, the proper persons to be sued by the purchaser for the specific performance of the contract are the vendor's executors or administrators, as being his general representatives in respect of his contractual liabilities and being the persons entitled to receive the purchase money; but the vendor's heir or devisee, who would have been entitled to the land if it had not been sold, was formerly and, it appears, is still a necessary party to the action, as having an interest in disputing the validity of the contract (*m*). The vendor's legal personal representatives are the proper persons to be sued for breach of the contract at law (*n*).

Death of the purchaser.

We have seen (*o*) that when a man enters into a contract, which is valid and specifically enforceable, for the purchase of land, the land is in equity *his* land as from the date of the contract. If therefore he die pending the completion of the contract, the benefit of his rights under the contract passes to the persons who become entitled to that particular part of his lands, which is represented by the property purchased. If this were freehold estate of inheritance, the beneficial interest therein

(*j*) Above, pp. 211 *sq.*, 504.
(*k*) Above, pp. 211, 221, 507.
(*l*) Above, pp. 503 *sq.*, 508.
(*m*) Above, pp. 503, nn. (*z*), (*a*), 506, n. (*q*), and the authorities there cited; Rawlins on Specific Performance, 83.
(*n*) But if the contract were under seal and bound the vendor's heirs, his heirs or devisees might be sued thereon at law: see above, p. 206; Wms. Conv. Stat. 234, 235.
(*n*) Above, pp. 481, 482.

passed formerly to his heir, if he died intestate in respect thereof, and otherwise to his specific or general devisee (*p*); and in the hands of such heir or devisee would be *real* assets for payment of his debts (*q*). Under the Land Transfer Act, 1897 (*r*), freehold estate of inheritance contracted to be purchased appears to pass, on the purchaser's death pending completion, to his executors or administrators, upon trust, subject to the payment of his funeral and testamentary expenses and debts, and subject also to payment of the purchase money, for his heir or devisee. If the property purchased were a legal estate of inheritance in copyholds, the purchaser's interest devolves upon his customary heir or devisee; and it does not appear that his executors or administrators take any estate therein under the Land Transfer Act, 1897: but the personal representatives take the purchaser's estate where he bought an equitable estate only in copyholds (*s*). In either case the lands would be real assets for payment of the purchaser's debts (*t*). If leaseholds were purchased, they pass of course to the purchaser's executors or administrators as part of his personal estate. The persons so becoming entitled, on the purchaser's death, to the land which he has contracted to purchase, are the proper persons to sue for the specific performance of the contract by the vendor; but the purchaser's legal personal representatives should be made parties to such an action, if brought by his heir or devisee, as they are liable to the vendor for payment of the purchase money and have an interest in disputing the contract (*u*). The proper persons to sue, after the purchaser's death, for damages at law for breach of the contract are his legal personal representatives (*x*); and any damages so recovered appear to form part of the purchaser's personal estate.

(*p*) Since the Wills Act, 1837, lands purchased after the date of a will pass under a general devise therein contained; previously they did not: Sug. V. & P. 183-189; stat. 7 Will. IV. & 1 Vict. c. 26, ss. 3, 23, 24.

(*q*) Above, pp. 205, 206, 482.

(*r*) Stat. 60 & 61 Vict. c. 65, ss. 1, 2; above, pp. 211, 212.

(*s*) *Re Somerville and Turner's Contract*, 1903, 2 Ch. 583; above, pp. 211, 221.

(*t*) Above, pp. 205, 206.

(*u*) Fry, Sp. Perf. § 217, 3rd ed. And it appears that where the purchaser's personal representatives sue for specific performance of a contract to buy real estate, as being entitled thereto under the Land Transfer Act, 1897, they should still make his heir or devisee a party as being the person beneficially entitled and being interested in securing a proper inquiry into the title: Rawlins, Spec. Perf. 83.

(*x*) *Orme* v. *Broughton*, 10 Bing. 533; Sug. V. & P. 238; 2 Dart, V. & P. 954, 5th ed.; 1084, 6th ed.; 998, 7th ed.

Purchaser's heir or devisee now takes subject to the vendor's lien.

Formerly, if one contracted to buy land and died pending completion, his heir or devisee, in the case of real estate, or his specific devisee in the case of leaseholds, was entitled to have the purchase money paid out of the deceased purchaser's general personal estate (*y*). But now, under the Acts amending Locke King's Act (*z*), the heir or devisee, or the specific devisee of leaseholds (*a*), or other chattels real (*b*), must take the hereditaments so purchased charged with the vendor's lien for payment of the purchase money, which is, as between the heir or devisee and the persons entitled to the purchaser's personalty, to be satisfied out of the estate purchased; unless the purchaser, being a *testator* of the property bought (*c*), should have signified a contrary intention within the meaning of the Acts. But these Acts do not affect the vendor's right to obtain payment of the purchase money out of all the purchaser's assets, real or personal (*d*). It is to be observed that the Acts apparently do not apply where the lands purchased are not subject to any vendor's lien, as may be the case if the parties so agree (*e*).

Test of the property devolving as land on the purchaser's death.

The right of a deceased purchaser's heir or devisee to succeed to real estate, contracted to be purchased by but not conveyed to him in his lifetime, depends upon the like condition as determines the question of the conversion of the property into personalty in the vendor's hands; that is to say, whether the contract was specifically enforceable against the purchaser at the time of his death. If this were so, the heir or devisee is

(*y*) *Broome* v. *Monck*, 10 Ves. 597, 614, 620, 621; *Hood* v. *Hood*, 3 Jur. N. S. 684.

(*z*) Stat. 40 & 41 Vict. c. 34, extending the provisions of 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, to the case of any testator or intestate dying after the 31st December, 1877, seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with any lien for unpaid purchase money, unless in the case of a *testator* he shall within the meaning of these Acts have signified a contrary intention; and providing that such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate. By stat. 30 & 31 Vict. c. 69, s. 1, a general direction that the debts of the testator shall be paid out of his personal estate is not to be deemed a declaration of such contrary intention without words expressly or impliedly referring to the debt charged on the land.

(*a*) *Re Kershaw*, 37 Ch. D. 674.

(*b*) *Re Fraser*, 1904, 1 Ch. 111, 726.

(*c*) See *Re Cockcroft*, 24 Ch. D. 94, 100.

(*d*) See stat. 17 & 18 Vict. c. 113.

(*e*) See *Re Cockcroft*, ubi sup.

absolutely entitled to the property; and he was formerly so absolutely entitled to have the purchase money raised out of the dead man's personalty that if the contract had been specifically enforceable against the purchaser at his death, but was not performed owing to some cause subsequently occurring, the heir or devisee was entitled to have the purchase money raised and applied in the purchase for him of other lands (*f*). But this was not the case where the contract failed to be performed owing to the vendor's want of title; for that proved that the contract was not specifically enforceable against the purchaser when he died (*g*). This doctrine of allowing the heir or devisee to have the purchase money raised and laid out in buying other lands appears to be only applicable, under the present law, where the heir or devisee does not take the estate purchased subject to the vendor's lien (*h*).

Devolution of the burthen of the contract on the purchaser's death.

The burthen of the contract on the purchaser's death before completion devolves upon his legal personal representatives, who are the proper persons to be sued by the vendor either in equity for specific performance of the contract or at law for damages for its breach (*i*); but the purchaser's heir or devisee becoming entitled to the purchased land was, and apparently still remains, a necessary party to proceedings at suit of the vendor for specific performance of the contract, as having an interest in seeing that the inquiry into title is properly conducted (*k*).

Bankruptcy of either party to the contract.

A contract for the sale of land is not discharged either by an act of bankruptcy committed or by a receiving order or an adjudication of bankruptcy made pending completion by or against either party thereto (*l*); but after a receiving order has

(*f*) *Whittaker* v. *Whittaker*, 4 Bro. C. C. 31; *Broome* v. *Monck*, 10 Ves. 597, 599, 606-608, 614; *Garnett* v. *Acton*, 28 Beav. 333; *Hudson* v. *Cook*, L. R. 13 Eq. 417; *sed qu.* whether this last case was rightly decided; the purchaser had entered into a contract which was not absolute, but voidable by the vendor in certain events.

(*g*) *Broome* v. *Monck*, 10 Ves. 597; *Collier* v. *Jenkins*, Younge, 295.

(*h*) Above, p. 515; *Re Cockcroft*, 24 Ch. D. 94, 100, 101.

(*i*) But if the contract were under seal, and bound the purchaser's heirs, his heirs or devisees might be sued thereon at law: 2 Dart, V. & P. 957, 5th ed.; 1084, 6th ed.; 998, 7th ed.; see above, p. 206; Wms. Conv. Stat. 234, 235.

(*k*) *Townsend* v. *Champernowne*, 9 Price, 130; above, pp. 503, nn. (*z*), (*a*), 506, n. (*q*), 513; Rawlins on Specific Performance, 83, 84.

(*l*) *Brooke* v. *Hewitt*, 3 Ves. 253, 255; Sug. V. & P. 175; 1 Dart, V. & P. 253, 5th ed.; 291, 6th ed.; 294, 7th ed.

been made against either party, the other has no remedy against the property or person of the debtor in respect of any liability of the debtor which is provable in bankruptcy, and cannot commence any action or other legal proceedings to enforce such liability, unless with the leave of the Court, and on such terms as the Court may impose (*m*). And after the presentation of a bankruptcy petition against either party to the contract the Court may stay any action, execution, or other legal process then pending against him (*n*). When a receiving order has been made against either party to the contract, the other may prove under the bankruptcy proceedings in respect of the debtor's liability on any contract made by him, so far as such liability consists in the obligation to pay money or money's worth on breach of the agreement, or is capable of resulting in the payment of money or money's worth (*o*). And an order of discharge under the Bankruptcy Act, 1914 (*p*), or a composition or scheme of arrangement accepted and approved by the Court under the same Act (*q*), will release the bankrupt or debtor from all liabilities provable in bankruptcy, with certain exceptions not material to be here stated. The vendor's liability on the contract at law seems to be provable in his bankruptcy, for it is reducible to the obligation to pay money damages on breach of the contract (*r*): but his liability in equity to perform the contract specifically depends on different considerations, and does not appear to be so provable (*s*). The purchaser's liability on the contract, whether at law or in equity, seems almost entirely to consist in his obligation to pay the price (*t*), and to be provable in his bankruptcy accordingly.

(*m*) Stat. 4 & 5 Geo. V. c. 59, ss. 7, 167, replacing 46 & 47 Vict. c. 52, ss. 9, 168; see *Re Guedalla*, 1905, 2 Ch. 331.

(*n*) Sect. 9, replacing sect. 10.

(*o*) Sect. 30, replacing sect. 37; see *Hardy* v. *Fothergill*, 13 App. Cas. 351.

(*p*) Stat. 4 & 5 Geo. V. c. 59, s. 28, replacing 46 & 47 Vict. c. 52, s. 30.

(*q*) Stat. 4 & 5 Geo. V. c. 59, s. 16 (13), replacing 53 & 54 Vict. c. 71, s. 3 (12); *Flint* v. *Barnard*, 22 Q. B. D. 90; *Seaton* v. *Deerhurst*, 1895, 1 Q. B. 853; *Levy* v. *Stogdon*, 1898, 1 Ch. 478, 483, 484, affirmed, 1899, 1 Ch. 5.

(*r*) Above, p. 36; *Levy* v. *Stogdon*, 1898, 1 Ch. 478, 483, 484, affirmed, 1899, 1 Ch. 5.

(*s*) See the cases cited in notes (*z*), p. 518, (*d*), p. 519, below; *Levy* v. *Stogdon*, ubi sup.; *Re Reis*, 1904, 2 K. B. 769, 777, 781, 787, affirmed, nom. *Clough* v. *Samuel*, 1905, A. C. 442; above, p. 37.

(*t*) Above, p. 34; and see *Re Taylor*, 1910, 1 K. B. 562.

Bankruptcy of the vendor.

If the vendor be adjudged bankrupt pending completion, his rights under the contract vest, as part of his property, in the trustee in his bankruptcy (*u*); and his estate in the land sold also vests in the trustee, unless, it appears, the contract had been executed by payment of the whole of the purchase money before the act of bankruptcy, so that the vendor had become a bare trustee for the purchaser (*x*). It has, however, been held, where leaseholds had been sold and the price paid but no conveyance executed, that the vendor was possessed of the legal estate in the term not only as trustee for the purchaser, but also for his own use in virtue of his lien on the property by way of indemnity against the rent and covenants of the lease, and that for this reason his estate passed on his subsequent bankruptcy to the trustee therein (*y*). But the trustee in the bankruptcy takes the vendor's estate in the land sold subject to the purchaser's equities therein under the contract (*z*); and if he cannot, or does not, disclaim the land sold under his power to disclaim onerous property (*a*), he cannot disclaim the contract for sale, where it contains no more than the usual reciprocal duties of vendor and purchaser (*b*), as an unprofitable contract (*c*); but the specific performance of the agreement may

(*u*) Stat. 4 & 5 Geo. V. c. 59, ss. 18, 38, 48 (5), 167, replacing 46 & 47 Vict. c. 52, ss. 20, 44, 50 (5), 168; *Expte. Rabbidge*, 8 Ch. D. 367.

(*x*) See *S. C.*, 8 Ch. D. 371; *Re Taylor*, 1910, 1 K. B. 562; above, p. 504. It does not appear that the vendor could be treated as holding the land sold on trust for the purchaser, so that it would not pass to his trustee in bankruptcy, merely by reason of the acceptance of the title: see cases cited in note (*d*), below, p. 519.

(*y*) *St Thomas's Hospital Governors* v. *Richardson*, 1910, 1 K. B. 271.

(*z*) *Expte. Holthausen*, L. R. 9 Ch. 722, 726; *Expte. Rabbidge*, 3 Ch. D. 367, 370, 371; *Re Taylor*, 1910, 1 K. B. 562; see above, pp. 480 *sq.*, 503.

(*a*) Stat. 4 & 5 Geo. V. c. 59, s. 54, replacing 46 & 47 Vict. c. 52, s. 55, as amended by 53 & 54 Vict. c. 71, s. 13, empowering the trustee in bankruptcy within twelve months after the first appointment of a trustee, or, where the property shall not have come to the knowledge of the trustee within one month after such appointment, within twelve months after he first became aware thereof, or in either case within such extended period as may be allowed by the Court, to disclaim any part of the property of the bankrupt which consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money; see *Re Cohen*, 1905, 2 K. B. 704.

(*b*) Above, pp. 31—34.

(*c*) See note (*a*), above.

be enforced against him by the purchaser (*d*). If the vendor should have bound himself by the contract to lay out money on the property sold prior to completion, his trustee in bankruptcy might, it is thought, be at liberty to disclaim the contract if it would be unprofitable, and so free himself from the obligation of incurring the expense: but even this disclaimer would not affect the purchaser's equitable interest in the land (*e*). And if the trustee in bankruptcy were entitled to disclaim, and should disclaim, the property sold as being onerous, as he might in the case of leaseholds, the purchaser's equitable interest therein would be equally unaffected (*e*), and the purchaser might apply to the Court for an order vesting the estate in him (*f*).

Act of bankruptcy by the vendor.

In consequence of the doctrine of the relation back of the title of a trustee in bankruptcy to the act of bankruptcy (*g*), if a purchaser of land have notice of an act of bankruptcy committed by the vendor, he cannot safely proceed with the contract (unless with the concurrence of the vendor's trustee in bankruptcy) during the three months for which the act of bankruptcy remains available as a ground of bankruptcy proceedings (*h*). For if the purchaser were to accept a conveyance from the vendor and to pay him the purchase money, then, if the vendor should afterwards be adjudged bankrupt in respect of that act of bankruptcy, the conveyance to the purchaser would be rendered ineffectual and the purchaser would be liable to pay the money over again to the trustee in bankruptcy (*i*).

(*d*) *Pearce* v. *Bastable's Trustee*, 1901, 2 Ch. 122; *Re Bastable*, 1901, 2 K. B. 518; *Re Taylor*, 1910, 1 K. B. 562.

(*e*) *Re Bastable*, 1901, 2 K. B. 518, 529; stat. 4 & 5 Geo. V. c. 59, s. 54 (2), replacing 46 & 47 Vict. c. 52, s. 55 (2).

(*f*) Ibid., s. 54 (6), replacing s. 55 (6).

(*g*) Stat. 4 & 5 Geo. V. c. 59, ss. 1, 37, replacing 46 & 47 Vict. c. 52, ss. 4, 43, as amended by 53 & 54 Vict. c. 71, ss. 1, 20; see *Ponsford* v. *Union of London, &c. Bank*, 1906, 2 Ch. 444; *McCarthy* v. *Capital and Counties Bank*, 1911, 2 K. B. 1088; *Re a Debtor*, 1912, 2 K. B. 533; above, p. 377, n. (*t*).

(*h*) See stat. 4 & 5 Geo. V. c. 59, ss. 4 (1) (*c*), 37, replacing 46 & 47 Vict. c. 52, ss. 6 (1) (c), 43.

(*i*) *Expte. Rabbidge*, 8 Ch. D. 367; *Powell* v. *Marshall*, 1899, 1 Q. B. 710, 712, 713; *Davis* v. *Petrie*, 1906, 2 K. B. 786; and see *Re Taylor*, 1910, 1 K. B. 562; and as to payment during a stay of advertisement of the receiving order pending an appeal against it, see *Re Wigzell*, 1920, 2 K. B. 835. Debtors who refuse to pay on the ground that the creditor has committed an act of bankruptcy will be allowed the costs of an action by him brought while that act is available: *McCarthy* v. *Capital and Counties Bank*, 1911, 2 K. B. 1088.

For these reasons, a vendor who has committed an act of bankruptcy is not entitled to enforce the specific performance of the contract (*j*). And where time is of the essence of the contract, as upon the sale of a public-house as a going concern (*k*), if the purchaser have notice of an act of bankruptcy by the vendor, which will be available at the time fixed for completion, he is entitled at law to treat the contract as broken, and to recover his deposit accordingly (*l*). Where time is not of the essence of the contract, as is usually the case on sales of land (*m*), it seems open to the purchaser, on receiving notice of an act of bankruptcy by the vendor, at once to object to the title, on the ground that after the act of bankruptcy the vendor can only convey an estate, which is no longer absolute but defeasible on adjudication, and cannot give a good receipt for the purchase money (*n*). And it is submitted that if the purchaser make this objection and at the time fixed for completion the vendor still remain unable to make a valid conveyance, either alone or with the concurrence of the trustee under an adjudication of bankruptcy against him, the purchaser, not being in default with regard to the performance of his part of the contract, will be entitled to treat the contract as broken. But if at the time fixed for completion the act of bankruptcy have ceased to be available or the vendor have been adjudged bankrupt, it appears that the vendor or his trustee in bankruptcy, as the case may be, will be entitled to enforce the contract either specifically in equity or at law. And if the purchaser do not repudiate the contract in the manner indicated above, it appears that the vendor or his trustee in bankruptcy will be entitled to enforce the same, specifically or otherwise, after the act of bankruptcy has ceased to be available or an adjudication has taken place, although the day fixed for completion is gone by (*o*). The vendor's trustee in bankruptcy must, however, obtain the permission of the committee of inspection before bringing any

(*j*) *Lowes* v. *Lush*, 14 Ves. 547.
(*k*) Above, p. 464.
(*l*) *Powell* v. *Marshall*, 1899, 1 Q. B. 710.
(*m*) Above, pp. 53, 54.
(*n*) See above, pp. 154—157; *Lowes* v. *Lush*, 14 Ves. 547, 549; *Goodwin* v. *Lightbody*, Dan. 153; *Hipwell* v. *Knight*, 1 Y. & C. 401, 419; Sug. V. & P. 176.
(*o*) See *Lowes* v. *Lush*, 14 Ves. 547, 549; Dart, V. & P. 498, 995, 5th ed.; 568, 1114, 6th ed.; 1225, 7th ed.; Rawlins on Specific Performance, 87; above, pp. 53, 54, 154—157. See *McCarthy* v. *Capital and Counties Bank*, 1911, 2 K. B. 1088.

action upon the contract against the purchaser (*p*). If the purchaser of his own accord choose to wait after the time fixed for completion, either until the vendor is adjudged bankrupt or until the particular act of bankruptcy has ceased to be available (*q*), he will be able to complete the contract safely, paying the purchase money to and taking a conveyance from the trustee in the bankruptcy in the former case, and in the latter the vendor himself. Under the Bankruptcy Act, 1914, if the purchaser should have no notice of an act of bankruptcy committed by the vendor, the conveyance of the property by and the payment of the purchase money to the vendor will not be invalidated in the event of the vendor being afterwards adjudged bankrupt upon that act of bankruptcy, provided that the conveyance and payment take place before the date of any receiving order made against the vendor (*r*). But if in such a case the completion of the contract should not take place until after that date, the purchaser is not protected; and it appears that both the conveyance to him and the payment by him would be rendered ineffectual on a consequent adjudication of bankruptcy against the vendor (*s*).

Insolvent vendor when discharged from liability on the contract.

If before completion of the contract the vendor be adjudged bankrupt and obtain an order of discharge, or a composition or scheme of arrangement with his creditors be accepted and approved by the Court, it appears that he will be released from his liability on the contract at law (*t*). But, as we have seen (*u*), the vendor's trustee in bankruptcy takes his legal estate in the land sold subject to the purchaser's equities therein; and if this estate were reconveyed to the vendor on his obtaining his discharge, he would take it subject to the same equities. So also, if the vendor's lands should be vested in a trustee in pursuance of a composition or scheme of arrangement under the Bankruptcy Act, 1914 (*v*), and afterwards re-conveyed to

(*p*) Stat. 4 & 5 Geo. V. c. 59, s. 56 (2), replacing 46 & 47 Vict. c. 52, s. 57 (2).
(*q*) Dart, V. & P. 498, 5th ed.; 568, 6th ed.; 1225, 7th ed.
(*r*) Stat. 4 & 5 Geo. V. c. 59, s. 45, replacing 46 & 47 Vict. c. 52, s. 49.
(*s*) *Expte. Rabbidge*, 8 Ch. D. 367, decided on the Bankruptcy Act, 1869; and see *Powell* v. *Marshall*, 1899, 1 Q. B. 710, 713, 714; *Re Taylor*, 1910, 1 K. B. 562.
(*t*) Above, p. 517.
(*u*) Above, p. 518.
(*v*) See stat. 4 & 5 Geo. V. c. 59, s. 16, sub-ss. 17, 18, replacing 53 & 54 Vict. c. 71, s. 3, sub-ss. 16, 17.

him on performance of the terms of the composition or arrangement, the lands would remain subject to the purchaser's equities therein. Besides this, the vendor's correlative equitable liability to specific performance of the contract does not appear to be provable in bankruptcy (*x*); so that a vendor making a composition or scheme of arrangement with his creditors under the Bankruptcy Act, 1914, without parting with his estate in the land sold, does not appear to be discharged from his liability to perform the contract specifically at the purchaser's suit (*y*).

Vendor an undischarged bankrupt at the time of the contract.

Where the vendor is an undischarged bankrupt at the time when the contract of sale was made, he cannot give a good title to or convey the land sold, if it were vested in him before his bankruptcy (*z*); and formerly he could not give a good title to freehold or other real estate (whether legal or equitable) if it had been acquired by or devolved upon him since the commencement of the bankruptcy (*a*). If, however, the property sold were held for a term of years, and had been acquired by or had devolved upon the vendor since the commencement of the bankruptcy, he could make a valid disposition thereof to anyone dealing with him in good faith and for value, either with or without notice of the bankruptcy, before the trustee intervened, and would therefore be entitled to enforce the contract against the purchaser in proceedings either for specific performance or damages (*b*). And this doctrine was extended to real estate purchased by undischarged bankrupts for partnership purposes and so converted into their personal property (*c*). And now, under the Bankruptcy Act, 1914, the doctrine applies generally to all real and personal property, that statute providing that all transactions by a bankrupt with any person dealing with him *bonâ fide* and for value in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall,

(*x*) Above, p. 517.

(*y*) See *Levy* v. *Stogdon*, 1898, 1 Ch. 478; 1899, 1 Ch. 5, where, however, the purchaser was barred by his delay from enforcing the specific performance of the contract, but was held to be entitled to a lien for the amount of his deposit.

(*z*) Above, p. 518, nn. (*u*), (*x*).

(*a*) Stat. 46 & 47 Vict. c. 52, s. 44; *Re New Land, &c. Assn. and Gray*, 1892, 2 Ch. 138; *Bird* v. *Philpott*, 1900, 1 Ch. 822; *Official Receiver* v. *Cooke*, 1906, 2 Ch. 661.

(*b*) *Re Clayton and Barclay's Contract*, 1895, 2 Ch. 212.

(*c*) *Re Kent, &c. Coke Co., Ltd.*, 1909, 2 Ch. 195; see above, pp. 443, 444.

if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction. This provision applied to transactions completed before 1st April, 1914, in any case where there had not been an intervention by the trustee before that date (*d*). If a bankrupt's assets be more than sufficient to satisfy his liabilities, he can make a valid disposition of his equitable interest in the surplus assets or any particular portion thereof, subject to the rights of the trustee and of his creditors (*e*). Where a tenant for life has a power to consent to the exercise by trustees of a power given to them to sell the settled land and becomes bankrupt, the concurrence of the trustee in the bankruptcy is necessary to enable his power of consent to be effectually exercised (*f*). The effect of the bankruptcy of a tenant for life on his capacity to exercise the power of sale given to him by the Settled Land Acts has been already discussed (*g*).

Bankruptcy of tenant for life empowered to consent to a sale.

If the purchaser be adjudged bankrupt pending completion, his rights under the contract vest in his trustee in bankruptcy (*h*), who will be entitled to enforce the same against the vendor by action brought with the permission of the committee of inspection (*i*) either for damages at law or for specific performance in equity (*j*). The trustee in bankruptcy of the purchaser is, however, at liberty to disclaim the contract as unprofitable (*k*), and so long as it remains open to him to exercise his option of disclaiming the contract (*l*), the vendor

Bankruptcy of the purchaser.

(*d*) Stat. 4 & 5 Geo. V. c. 59, s. 47 (1), replacing 3 & 4 Geo. V. c. 34, s. 11 (1). The mere fact that a purchaser has notice of the bankruptcy does not deprive him of the benefit of the section, which embodies the law to this effect laid down (as to the bankrupt's personal estate, but now extended by that section to his real estate) in *Cohen* v. *Mitchell*, 25 Q. B. D. 262, 267; see *Hosack* v. *Robins* (No. 2), 1918, 2 Ch. 339, 345; Williams, Bankruptcy Practice, 12th ed. 244, 245.

(*e*) *Bird* v. *Philpott*, 1900, 1 Ch. 822.

(*f*) *Re Bedingfield and Herring's Contract*, 1893, 2 Ch. 332; see Williams on Settlements, 43-45, 322, 323.

(*g*) Above, pp. 305—307.

(*h*) Above, p. 518, n. (*u*).

(*i*) Above, p. 521, n. (*p*).

(*j*) 2 Dart, V. & P. 995, 1004, 5th ed.; 1114, 1126, 6th ed.; 1029, 7th ed.; Rawlins on Specific Performance, 87, 88.

(*k*) Above, p. 518, n. (*a*); *Expte. Barrell*, L. R. 10 Ch. 512.

(*l*) See stat. 4 & 5 Geo. V. c. 59, s. 54, replacing 46 & 47 Vict. c. 52, s. 55; above, p. 518, n. (*a*).

cannot, without his consent, maintain an action against him for specific performance of the contract (*m*). If the purchaser's trustee in bankruptcy disclaim the contract, this will operate to determine the liabilities of the bankrupt in respect thereof (*n*); the vendor will be entitled to retain the deposit, if any (*o*), and he may prove for any injury sustained by him in consequence of the disclaimer as a debt under the bankruptcy (*p*).

Act of bankruptcy by the purchaser.

If the vendor have notice of an act of bankruptcy committed by the purchaser, he cannot safely proceed with the contract so long as the act of bankruptcy remains available; for any money subsequently paid to him by the purchaser might be recovered back by the trustee under a consequent adjudication of bankruptcy against the purchaser (*q*). For this reason, a purchaser who has committed an act of bankruptcy which remains available against him cannot enforce the specific performance of the contract by the vendor (*r*). And it appears that, if time be of the essence of the contract, and on the day fixed for completion the purchaser's act of bankruptcy still remain available against him, the vendor will be entitled to treat the contract as broken and to claim the deposit as forfeited (*s*). And if time be not of the essence of the contract, it seems that the vendor receiving notice of an act of bankruptcy by the purchaser may at once take the objection that the purchaser is not and will not at the time fixed for completion be capable of making a valid payment of the purchase money, and may repudiate the contract on this ground (*t*). But, as in the case of an act of bankruptcy by the vendor, when an act of bankruptcy by the purchaser has not been followed by any bankruptcy proceedings, and has ceased to be available against

(*m*) *Holloway* v. *York*, 25 W. R. 627.
(*n*) Stat. 4 & 5 Geo. V. c. 59, s. 54 (2), replacing 46 & 47 Vict. c. 52, s. 55 (2).
(*o*) *Expte. Barrell*, L. R. 10 Ch. 512; *Collins* v. *Stimson*, 11 Q. B. D. 142.
(*p*) Stat. 4 & 5 Geo. V. c. 59, s. 54 (8), replacing 46 & 47 Vict. c. 52, s. 55 (7).
(*q*) Above, pp. 518, n. (*u*), 519, n. (*g*); see next note, and *Re Pollitt*, 1893, 1 Q. B. 175, 455; *Ponsford* v. *Union of London, &c. Bank*, 1906, 2 Ch. 444; *Davis* v. *Petrie*, 1906, 2 K. B. 786; *McCarthy* v. *Capital and Counties Bank*, 1911, 2 K. B. 1088; *Re Ashwell*, 1912, 1 K. B. 390.
(*r*) *Franklin* v. *Brownlow*, 14 Ves. 550.
(*s*) See above, p. 520; *Collins* v. *Stimson*, 11 Q. B. D. 142.
(*t*) See above, p. 520; *Collins* v. *Stimson*, ubi sup.

him, it is thought that he will be entitled to enforce the contract specifically or otherwise, unless in the meantime the vendor has become entitled to repudiate the contract, and, in the case of a sale where time is not of the essence of the contract, has repudiated the same (*u*). And in such case the vendor may safely complete the contract with the purchaser (*x*). Where the vendor has no notice of an act of bankruptcy committed by the purchaser, and the contract is executed by payment of the purchase money before the date of any receiving order against the purchaser, the transaction is expressly protected, and the trustee under an adjudication founded on that act of bankruptcy cannot recover the money back (*y*). And even if in such case the contract be completed after that date, and the vendor, without notice of the act of bankruptcy, receive from the purchaser any money or negotiable securities in payment of the price, he will obtain a perfectly valid title thereto under the general law (*z*).

Adjudication of bankruptcy against the purchaser.

If the purchaser be adjudged bankrupt pending completion, the vendor ought to make application in writing to the trustee in the bankruptcy requiring him to decide whether he will disclaim the contract or not; for if the trustee do not disclaim the contract within twenty-eight days after the receipt of such an application or within such extended period as may be allowed by the Court, he will no longer be entitled to disclaim the contract *but shall be deemed to have adopted it* (*a*). These last words, as to the adoption of the contract, were added to the bankruptcy law (*b*) by the Bankruptcy Acts, 1883 and 1914, and they have not yet received any judicial interpretation. Apparently, their effect is to impose on the trustee, being so deemed to adopt the contract, the liability to fulfil it with the bankrupt's assets, but not to make the trustee otherwise personally liable on the contract (*c*). If so, it would seem that

(*u*) See above, pp. 520, 521.
(*x*) See above, p. 521.
(*y*) See above, p. 521, n. (*r*).
(*z*) See Wms. Pers. Prop. 589, 590, 17th ed.
(*a*) Stat. 4 & 5 Geo. V. c. 59, s. 54 (4), replacing 46 & 47 Vict. c. 52, s. 55 (4).
(*b*) Apparently in consequence of the decision in *Re Sneezum*, 3 Ch. D. 463.
(*c*) See the arguments put forward in the Court of Appeal and the judgment of James, L. J., in the last-mentioned case: Williams's Bankruptcy Practice, 329, 330, 12th ed.

the purchaser's trustee in bankruptcy, on being so deemed to adopt the contract, would be liable to be sued on the contract by the vendor either for specific performance or for damages (*d*). If, however, the vendor make no application requiring the trustee to elect as to disclaimer of the contract, and the trustee allow the time otherwise limited to him for disclaiming onerous property (*e*) to elapse without disclaiming the contract, it is not provided that the trustee shall be deemed to have adopted the contract; and in such case it does not appear that the trustee comes under any liability to perform it, or that the vendor can maintain any action thereon, either for specific performance or damages, against the trustee (*f*). But by the Bankruptcy Act, 1914 (*g*), the Court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy. If the purchaser's trustee in bankruptcy do not disclaim the contract, the question arises whether the vendor can safely complete the contract with the trustee electing to adopt it. The Bankruptcy Act, 1914 (*h*), gives no express power to the trustee to perform the bankrupt's contracts generally. But the trustee is expressly empowered, with the permission of the committee of inspection, to bring any action or other legal proceeding relating to the property of the bankrupt (*i*), which includes the benefit of a contract made by the bankrupt (*k*); and by the former bankruptcy law the trustee was entitled to perform a contract entered into by the bankrupt, if he thought it would be beneficial to the creditors (*l*). It seems therefore that, as under the present Bankruptcy Act the purchaser's trustee may, with the permission of the committee of

(*d*) See above, p. 524.
(*e*) Above, p. 518, n. (*a*).
(*f*) See *Re Sneezum*, 3 Ch. D. 463; *Holloway* v. *York*, 25 W. R. 627.
(*g*) Stat. 4 & 5 Geo. V. c. 59, s. 54 (5), replacing 46 & 47 Vict. c. 52, s. 55 (5).
(*h*) Stat. 4 & 5 Geo. V. c. 59, replacing 46 & 47 Vict. c. 52; see sects. 55, 56, replacing sects. 56, 57; *Re Sneezum*, 3 Ch. D. 463, 473.
(*i*) Sect. 56 (2), replacing sect. 57 (2).
(*k*) Sect. 167, replacing sect. 168.
(*l*) *Re Sneezum*, 3 Ch. D. 463, 472, 474.

inspection, sue the vendor for specific performance of the contract on the usual terms of paying the price, so he may well secure the same benefit on the same terms without litigation where the vendor is willing to carry out the contract (*m*); but it is thought that the trustee ought to obtain the permission of the committee of inspection before so performing the contract, and that the vendor cannot safely complete the contract unless this be done (*n*).

Insolvent purchaser when discharged from liability on the contract.

If before completion of the contract the purchaser should be adjudged bankrupt and obtain an order of discharge or should make a composition or a scheme of arrangement with his creditors approved under the Bankruptcy Act, 1914, it appears that he would be released from all liability under the contract, even though the trustee had not disclaimed the contract and the vendor had not proved in respect of the purchaser's liability (*o*).

Purchaser an undischarged bankrupt at the time of the contract

If the purchaser were an undischarged bankrupt at the time when the contract of sale was made, and the vendor complete the contract and receive, in ignorance of that fact, any money or negotiable securities in payment of the price, the same cannot, of course, be recovered from him, whether the trustee in bankruptcy were entitled thereto or not (*p*). If, however, the vendor receive notice, before completion, of the purchaser's bankruptcy, it does not appear that he would obtain a good title to any money subsequently paid to him by the bankrupt in pursuance of the contract, unless the money had been acquired by the purchaser since the commencement of the bankruptcy, and the trustee had not intervened to claim it (*q*). The purchaser, it seems, would be obliged to prove that this was the case, and, if he failed to discharge this obligation satisfactorily, the vendor could not safely complete the contract without the concurrence of the trustee (*r*).

(*m*) See the principle applied in *Stagg* v. *Medway Navigation Co.*, 1903, 1 Ch. 169.

(*n*) See *Re Vavasour*, 1900, 2 Q. B. 309.

(*o*) See above, p. 517.

(*p*) See Wms. Pers. Prop. 590, 17th ed.; *Collins* v. *Stimson*, 11 Q. B. D. 142.

(*q*) See Pollock, B., *Collins* v. *Stimson*, 11 Q. B. D. 142, 144, as to the money, which in that case was the property of the trustee, being earmarked: *Expte. Dewhurst*, L. R. 7 Ch. 185, where note that the money had been acquired by the bankrupt after the bankruptcy.

(*r*) See above, p. 524.

Land taken in execution pending completion.

The vendor may suffer the involuntary alienation of the land sold pending completion, not only in the event of his bankruptcy, but also if the land be taken in execution of a judgment against him (*s*). If this be done, either under a writ of *elegit* or by virtue of an order for the appointment of a receiver (*t*), and the writ or order be duly registered under the Land Charges Acts, 1888 and 1900 (*u*), the judgment creditor will acquire an indefeasible estate by *elegit* in the land, entitling him to hold the same until his debt be satisfied out of the rents and profits (*x*): and this will be a legal estate in the land sold, where the vendor's interest therein was legal (*x*). The judgment creditor further acquires a charge on the land so taken in execution for the amount of the judgment debt and interest (*y*), and may obtain an order for the sale of the debtor's interest in the land (*z*). And these rights of the creditor are not now affected or liable to be diminished in case the purchaser had no notice of the judgment (*a*). The judgment creditor, however, takes the estate and interest so acquired by him in the land sold subject to the purchaser's equities therein under the contract (*b*). If the whole or any part of the purchase money should have been paid to the vendor prior to the registration of the writ or order of execution (before which time the judgment cannot now operate as a charge on the land or on any unpaid purchase money therefor (*c*)), the purchaser has priority in respect of the amount so paid over the creditor's interest in the land (*b*). If, however, the whole of the purchase money have not been paid before the registration of the writ or order, the

(*s*) See Wms. Real Prop. 287 *sq.*, 23rd ed.

(*t*) See ibid. 288 *sq.*, 315.

(*u*) Stats. 51 & 52 Vict. c. 51, ss. 4-6; 63 & 64 Vict. c. 26, s. 2 (1); see Wms. Real Prop. 293, 294, 296, 23rd ed.

(*x*) See ibid. 292, n. (*g*), 295.

(*y*) Stat. 1 & 2 Vict. c. 110, s. 13; see Wms. Real Prop. 290, 295, 23rd ed.

(*z*) Stat. 27 & 28 Vict. c. 112, s. 4, amended by 63 & 64 Vict. c. 26, s. 5; see Wms. Real Prop. 295, 296, 23rd ed.

(*a*) By the Judgments Act, 1839, no judgment, as against purchasers and mortgagees without notice thereof, should bind any hereditaments more extensively than a duly docketed judgment would have bound such purchaser or mortgagee before the Judgments Act, 1838; but this enactment was repealed by the Land Charges Act, 1900: see stats. 2 & 3 Vict. c. 11, s. 5; 63 & 64 Vict. c. 26, s. 5; Wms. Real Prop. 290-297, 568, 569, 23rd ed.

(*b*) Sug. V. & P. 517, 518, 527; *Whitworth* v. *Gaugain*, 1 Ph. 728; *Lodge* v. *Lyseley*, 4 Sim. 70.

(*c*) Stat. 63 & 64 Vict. c. 26, s. 2 (1); Wms. Real Prop. 294, 296, 23rd ed.

judgment creditor becomes entitled to receive the amount remaining unpaid, or so much thereof as will satisfy the judgment debt; and the purchaser is bound and must take care to pay this amount to the creditor and not to the vendor (*d*). Any writ or order of execution and any delivery in execution of the land sold pending completion is void as against the purchaser unless the writ or order be duly registered in the Office of Land Registry under the Land Charges Act, 1888 (*e*); and the judgment does not operate as a charge on the land or any interest therein, or on the unpaid purchase money therefor, unless or until such registration takes place (*f*). But, as we shall see hereafter (*g*), it is thought that, if the purchaser have notice that the land sold has actually been delivered in execution under an unregistered writ or order, he cannot safely disregard the fact; for the execution is valid as against the judgment debtor, and confers upon the judgment creditor an estate by *elegit* voidable, in default of registration, as against purchasers only, and it may be held that such delivery in execution is valid in equity as against a purchaser with notice thereof. Where the land sold is seized pending completion under process of execution which is valid, either at law or in equity, as against the purchaser, the judgment creditor must concur in the conveyance in order to convey his interest in the land sold, and receive and give a discharge for so much of the purchase money as is payable to him. The delivery in execution of any land, whether by writ of *elegit* or order appointing a receiver, is not an act of bankruptcy, so that in such cases the sale may be safely completed with the judgment creditor's concurrence (*h*).

(*d*) Sug. V. & P. 518, 527; *Forth* v. *Norfolk*, 4 Madd. 503, 505; *Re Pope*, 17 Q. B. D. 743.

(*e*) Stat. 51 & 52 Vict. c. 51, ss. 4-6.

(*f*) Stat. 63 & 64 Vict. c. 26, s. 2 (1). These provisions apply to writs or orders affecting any hereditaments of any tenure; and appear therefore to apply to writs of *fi. fa.* when used for seizing leaseholds, as well as writs of *elegit:* stats. 51 & 52 Vict. c. 51, s. 4; 63 & 64 Vict. c. 26, s. 6 (3); see Wms. Real Prop. 568, 569, 23rd ed.

(*g*) Below, Chap. XII. Sect. 2.

(*h*) See stat. 4 & 5 Geo. V. c. 59, s. 1 (1), replacing stat. 46 & 47 Vict. c. 52, s. 4, and par. (*e*) of the same sub-section, replacing 53 & 54 Vict. c. 71, s. 1. A debtor commits an act of bankruptcy if (amongst other things) execution against him has been levied by seizure of his goods under process in an action in any Court or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days. In this context "goods" includes all chattels personal, but not apparently chattels real: see stat. 4 & 5

Execution against the purchaser.

It appears that equitable execution issued by the appointment of a receiver in respect of a purchaser's interest in land under the contract for sale will not operate to give the judgment creditor any charge on the land, if the vendor should never become an absolute and a bare trustee for the purchaser. Such execution cannot therefore affect the vendor's right to rescind the contract for the purchaser's breach of one of the main duties thereby imposed on him (*i*). The subject of executions issued against the land sold pending completion is further discussed below, under the head of Searches (*k*).

Lunacy.

If either vendor or purchaser, having been sane when the contract was made, become of unsound mind before its completion, that does not avoid the contract, and an order for its specific performance may nevertheless be obtained (*l*). As, however, a person of unsound mind can make no valid conveyance or payment to another, who has notice of his mental condition (*m*), he cannot himself effectively perform the acts necessary to completion. But the completion of the contract may be obtained in certain cases by means of an order under the Lunacy Acts, 1890 to 1911 (*n*). By these Acts, the Judge or a Master (*o*) in lunacy may by order authorise the committee of a lunatic to perform any contract relating to the property of the lunatic entered into before his lunacy (*p*); and in the case of persons of unsound mind, not being lunatics so found by inquisition, to whom the powers of management and

Geo. V. c. 59, ss. 40, 167, replacing stat. 46 & 47 Vict. c. 52, ss. 45, 168. If execution be levied on a debtor's leaseholds by writ of *fi. fa.*, and the sheriff hold them for twenty-one days, it is a question whether an act of bankruptcy is committed; and if so, a purchaser of the land could not safely complete his contract, even with the judgment creditor's concurrence: see above, pp. 519, 520.

(*i*) See *Ridout* v. *Fowler*, 1904, 1 Ch. 658, 2 Ch. 93; above, pp. 481, 482, 504, 505, 511; and see above, p. 35; below, Chap. XVIII. § 2, XIX. § 1.

(*k*) Chap. XII. § 2.

(*l*) *Owen* v. *Davies*, 1 Ves. sen. 82; *Hall* v. *Warren*, 9 Ves. 605.

(*m*) Wms. Real Prop. 323, 324, 23rd ed.; Wms. Pers. Prop. 101, 174, 17th ed.

(*n*) Stats. 53 Vict. c. 5, s. 120 (i); 54 & 55 Vict. c. 65; 8 Edw. VII. c. 47; 1 & 2 Geo. V. c. 40.

(*o*) Stat. 54 & 55 Vict. c. 65, s. 27 (1), which enabled the jurisdiction of the judge in these respects to be exercised by the Masters; see *Re Browne*, 1894, 3 Ch. 412; *Re Langdale*, 1901, 1 Ch. 3.

(*p*) Stat. 53 Vict. c. 5, s. 120 (i).

administration given by the Act of 1890 apply (*q*), any powers which, if such person were a lunatic so found by inquisition, could be exercised by the committee of the estate, may be exercised by such person, in such manner, and with or without security as the Judge or, subject to rules in lunacy, a Master may direct (*r*). And the committee of the estate, or such person as the Judge or Master approves, shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this Act as the Judge or Master directs, and every such assurance and thing shall be valid and effectual, and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject (*s*). If the vendor become of unsound mind after the contract has been so far executed that he is a trustee for the purchaser within the meaning of the statutes authorising vesting orders to be made as to the estates of trustees (*t*), an order vesting the vendor's estate in the purchaser may be obtained under the Lunacy Acts, 1890 to 1911 (*u*).

(*q*) By stat. 53 Vict. c. 5, s. 116 (1), these powers apply—

(a) To lunatics so found by inquisition;

(b) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of the Act;

(c) To every person lawfully detained as a lunatic though not so found by inquisition (see *Re Whalley*, 1906, 1 Ch. 565);

(d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the Judge in lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs (see *Re Browne*, 1894, 3 Ch. 412; *Re Spurling*, 1909, 1 Ch. 199);

(e) To every person as to whom it is proved to the satisfaction of the Judge in lunacy that he is of unsound mind and incapable of managing his affairs, and that his property does not exceed 2,000*l.* in value, or that the annual income thereof does not exceed 100*l.*;

(f) To every person as to whom the Judge is satisfied that he is or has been a criminal lunatic, and continues to be insane and in confinement.

(*r*) Stat. 8 Edw. VII. c. 47, s. 1, replacing and (*semble*) extending 53 Vict. c. 5, s. 116 (2).

(*s*) Stat. 53 Vict. c. 5, s. 124, as amended by 54 & 55 Vict. c. 65, s. 27 (1).

(*t*) Above, pp. 510, 511.

(*u*) Stat. 53 Vict. c. 5, s. 135, amended, as regards the effect of the order by 8 Edw. VII. c. 47, s. 2; see *Re Cuming*, L. R. 5 Ch. 72; *Re Pagani*, 1892, 1 Ch. 236. The jurisdiction is now exerciseable by the High Court; stat. 1 & 2 Geo. V. c. 40, s. 1; R. S. C. Ord. LV. r. 13B.

Marriage of either party to the contract.

If either party to the contract be a single woman, and marry pending completion, she is not, under the present law (*x*), disabled from enforcing or completing the contract by herself alone. If she should have made no disposition of her interest in the contract by way of settlement, she will on marriage become entitled to the same as her separate property (*y*) and will be enabled to sue alone in respect thereof as if she were a *feme sole* (*z*). And she will be liable to be sued thereon without her husband being joined (*a*); although he will be liable on the contract to the extent of all property belonging to her which he shall have acquired or become entitled to from or through her, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him at law in respect of her ante-nuptial debts, contracts or wrongs (*b*), and he may be sued on the contract either alone or jointly with her accordingly (*c*). If she be the vendor, her estate in the land sold will become her separate property on marriage, unless otherwise disposed of by ante-nuptial settlement, and she will be able to convey the same to the purchaser without her husband's concurrence (*d*). In consequence of the inconvenient doctrine that the legal estate in land vested in a married woman as trustee does not become and cannot be conveyed as her separate property (*e*)—a doctrine intended to be remedied by the Married Women's Property Act, 1907 (*f*), which enabled a married woman to dispose as if she were a *feme sole* of real or personal property held by her as trustee or personal representative—it seems necessary to point out that when a vendor of land, being the beneficial owner thereof, is or pending completion becomes a married woman, the purchaser could not before that Act and cannot now require the concurrence of her husband in the conveyance on the ground

(*x*) As to the effect of marriage on a woman's legal capacity at common law, see below, Chap. XVI.; Wms. Real Prop. 333 *sq.*, 23rd ed.; Wms. Pers. Prop. 532, 17th ed.

(*y*) Stat. 45 & 46 Vict. c. 75, ss. 1 (1), 2, 24.

(*z*) Sects. 1 (2), 12, 24.

(*a*) Sect. 13; and see sect. 19; *Jay* v. *Robinson*, 25 Q. B. D. 467; *Robinson* v. *Lynes*, 1894, 2 Q. B. 577.

(*b*) Sect. 14.

(*c*) Sect. 15; see *Beck* v. *Pierce*, 23 Q. B. D. 316.

(*d*) Sects. 1 (1), 2; *Re Drummond & Davie's Contract*, 1891, 1 Ch. 524.

(*e*) *Re Harkness & Allsopp's Contract*, 1896, 2 Ch. 358; see below, Chap. XVI.

(*f*) Stat. 7 Edw. VII. c. 18, s. 1 (1); see below, Chap. XVI.

that she became an absolute trustee for the purchaser at the time when the title was accepted (*g*). For in the first place, when a married woman is disposing of her separate property for her own use, she is not a trustee thereof within the meaning of this doctrine at any time prior to the execution of the contract by payment of the purchase money (*h*). And secondly, even admitting that she were an absolute trustee for the purchaser on acceptance of the title, she would, on payment of the price, become a *bare* trustee for him (*i*), and so might well make a conveyance to him on receipt of the purchase money by virtue of the power of conveyance given to married women, who are bare trustees, by the Trustee Act, 1893 (*k*). The marriage of a man does not, of course, affect his legal capacity. But on the marriage of either party to the contract, whether man or woman, the other party should inquire whether any settlement or agreement for a settlement has been made affecting the property sold or his or her interest in the contract (*l*); since if any such disposition should have been made, the contract can no longer be safely or properly completed with the lately married party alone, but the concurrence of the persons to whom his or her interest has been assigned must be obtained (*m*).

Conviction of treason or felony.

If, pending completion, either party to the contract have judgment of death or penal servitude pronounced or recorded against him in England, Wales or Ireland, upon any charge of treason or felony, he cannot, so long as he remains a convict, bring any action on the contract either at law or in equity, or alienate any property (*n*); but all his property, including his interest in the contract or in the land sold, vests in the person appointed to be his administrator, who may sue or be sued on the contract, and has such powers of dealing with the convict's property as will enable him to complete the contract (*o*).

(*g*) Above, p. 504.
(*h*) See *Re Brooke & Fremlin's Contract,* 1898, 1 Ch. 647; above, pp. 481, 482.
(*i*) Above, p. 504.
(*k*) Stat. 56 & 57 Vict. c. 53, s. 16, replacing 37 & 38 Vict. c. 78, s. 6; see *Re Howgate and Osborn's Contract,* 1902, 1 Ch. 451; below, Chap. XVI.
(*l*) 1 Dart, V. & P. 329, 5th ed.; 373, 6th ed.; 367, 7th ed.
(*m*) See above, pp. 123, 124.
(*n*) Stat. 33 & 34 Vict. c. 23, ss. 6-8; and see sect. 30.
(*o*) Sects. 9-14; *Carr* v. *Anderson,* 1903, 2 Ch. 279. The administrator of a convict has, however, no power to bar an estate tail vested

Outlawry.

Outlawry, which remains theoretically possible in criminal proceedings, would, if incurred by a party to the contract pending completion, involve his incapacity to enforce the contract and would raise obstacles to the completion in the forfeiture to the Crown of the profits of his real estate and of his goods and chattels (*p*). If, pending completion, either party to the contract become an alien enemy (*q*), he cannot enforce the contract whilst he remains so (*r*); unless indeed he be resident in this country under the King's protection (*s*).

Party becoming an alien enemy.

Assignment by a party to the contract.

Assignment by the vendor of the land sold.

We will now consider the effect of the assignment by either party to the contract of the land sold or of his beneficial interest in the contract. With regard to the assignment by the vendor of the land sold, this land being in equity the property of the purchaser as from the date of the contract for sale, the vendor is not entitled to make any disposition thereof pending the completion of the contract to any other person or otherwise in derogation or to the prejudice of the purchaser's rights under the contract (*t*); any such disposition by the vendor of the land sold constitutes a breach of the contract, for which the purchaser may at once sue him at law, without making any offer to complete the contract or other formality (*u*), and the vendor may, as we have seen (*v*), be restrained by injunction from so parting with his estate in the land. If, however, the vendor do make any such alienation of the land sold, either for a legal estate to a volunteer, with or without notice of the contract for sale, or to a purchaser with notice of the contract (*w*), or for an equitable estate only to any person (*x*), the alienee takes subject to the purchaser's equities under the contract, may be joined as a party to an action for its specific

in the convict: but the convict himself can execute a disentailing deed; *Re Gaskell & Walters' Contract*, 1906, 2 Ch. 1; see above, p. 506, n. (*t*); below, Chap. XVI.

(*p*) See below, Chap. XVI.; Wms. Real Prop. 49, 120, 325, 23rd ed.; Wms. Pers. Prop. 102, 168, 175, 17th ed.

(*q*) See *Janson* v. *Driefontein, &c.*, 1902, A. C. 484, 505, 506.

(*r*) See below, Chap. XVI.

(*s*) See *Schaffenius* v. *Goldberg*, 1916, 1 K. B. 284.

(*t*) Above, pp. 480 *sq.*, 494.

(*u*) *Main's case*, 5 Rep. 20b; *Lovelock* v. *Franklyn*, 8 Q. B. 371; *Synge* v. *Synge*, 1894, 1 Q. B. 466, 471; *Stickney* v. *Keeble*, 1915, A. C. 386, 392, 416; see below, Chap. XVIII. § 2.

(*v*) Above, pp. 480 *sq.*, 494.

(*w*) *Dawson* v. *Ellis*, 1 J. & W. 524.

(*x*) See above, p. 452.

performance, and may be ordered to convey his interest in the land to the purchaser in order to complete the sale (*y*). But if, upon such an alienation by the vendor, the alienee acquire a legal estate in the land sold for valuable consideration actually paid or executed in good faith without notice of the contract for the sale, he is entitled to hold this estate free from all equities of the purchaser, who has no remedy but to sue the vendor for compensation for his loss (*z*). And the alienee, taking in good faith and for the like valuable consideration, is entitled to the same priority over the purchaser, not only where he has acquired the legal estate, but also where he has, before receiving notice of the contract for sale, acquired the best right to call for the legal estate. For instance, if A. were seised of lands in fee on trust for B., and B. contracted to sell the lands to C., and, pending completion of that contract and without notice thereof, the same lands were sold by B. to D., and the sale to D. were completed by payment of the purchase money, and the execution by A., at B.'s request, of an express declaration of trust in D.'s favour, it appears that C. would have no better equity than D. to insist on possession of the land (*a*). But it is to be observed that the protection obtained against the purchaser's prior equity by a subsequent alienee acquiring in good faith, for value and without notice, the legal estate or the best right to call for it, does not extend beyond the interest actually acquired for valuable consideration paid or executed before any notice of such equity has been received. If the vendor, pending completion, dispose of the land sold to a stranger for any valuable consideration which is wholly or in part executory, the alienee, though he has obtained the legal estate in good faith and without notice of the sale, cannot, if he afterwards receive notice thereof, safely perform for the vendor's use any part of the consideration then remaining un-

To purchaser for value without notice.

(*y*) Above, p. 503, n. (*y*); Fry, Sp. Perf. §§ 206, 207, 241, 3rd ed.

(*z*) See *Mansell* v. *Mansell*, 2 P. W. 678, 681; *Willoughby* v. *Willoughby*, 1 T. R. 763, 771-773; *Clemow* v. *Geach*, L. R. 6 Ch. 147; *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259; *Cave* v. *Cave*, 15 Ch. D. 639; *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Hallas* v. *Robinson*, ib. 288; *Synge* v. *Synge*, 1894, 1 Q. B. 466, 471. And consider *Dunn* v. *Chapman*, 1920, 2 Ch. 474, where the vendor's assign under a completed contract of sale was only liable to the claim of the purchaser under a prior contract because the latter had already brought an action for specific performance and registered it as a *lis pendens*.

(*a*) See *Wilkes* v. *Bodington*, 2 Vern. 599; *Willoughby* v. *Willoughby*, 1 T. R. 763, 767-772; *Stanhope* v. *Verney*, 2 Eden, 81; *Wilmot* v. *Pike*, 5 Hare, 14, 21-23; *Perham* v. *Kempster*, 1907, 1 Ch. 373, 378.

executed. Thus, if the vendor, pending completion of the original sale, re-sell the land and convey the legal estate therein to another without receiving payment of the whole price, the second purchaser is protected against the first purchaser's prior equity as regards so much of his purchase money as he has paid before receiving notice of the first sale, and is entitled to hold his legal estate as security for the amount so paid. But after he has received such notice he cannot safely pay the rest of his purchase money; for he will not be entitled to set up *his* contract of sale as specifically enforceable against the first purchaser, and, as between himself and the vendor, that contract will be rescinded and he will be discharged from all further performance of his obligations thereunder (*b*). If the vendor, pending completion of the contract, convey an equitable estate in the land sold for valuable consideration to some third person, the alienee cannot, after receiving notice of the contract for sale, protect himself against the purchaser's claim by taking a conveyance of the legal estate from the vendor, or from an express trustee thereof for the vendor (*c*). But otherwise the alienee is entitled to tack his own equitable interest to the legal estate if he can obtain it without any breach of trust on the part of the conveying party, so that if the legal estate in the property be outstanding in a mortgagee the alienee, on taking a transfer of the mortgage, even after receiving notice of the sale, can exclude the purchaser's rights (*d*).

Tacking by vendor's alienee.

(*b*) *Jones* v. *Stanley*, 2 Eq. Ca. Abr. 685, pl. 9; *Story* v. *Windsor*, 2 Atk. 630; *Hardingham* v. *Nicholls*, 3 Atk. 304; *Tourville* v. *Naish*, 3 P. W. 307; Sug. V. & P. 789. In the last case a purchaser who had taken a conveyance and given a bond for the balance of the price without notice of a prior equitable incumbrance, and received notice thereof prior to payment of the money due on the bond, was postponed to the incumbrancer, as regards such money, on the ground that he would be entitled in equity to avoid payment of the money on the bond. The giving of a bond or covenant for payment of the whole or part of the purchase money may, perhaps, be properly treated as not constituting executed consideration within the meaning of the rule stated above, as any assignee of the debt so secured would take subject to the equities between the debtor and original creditor. But if the sale were made on the terms that a negotiable security should be given for the unpaid purchase money, it appears that the giving of such security ought to be treated as executed consideration, at least where the security has been negotiated before notice of the prior equity is received; for after the negotiable security has come to the hands of a *bonâ fide* holder for value the liability thereon can no longer be avoided.

(*c*) Above, p. 456, n. (*i*); *Potter* v. *Sanders*, 6 Hare, 1.

(*d*) *Taylor* v. *Russell*, 1892, A. C. 244; *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 36, 37; above, pp. 453-456.

Alienation by the purchaser of the land sold.

The purchaser is, as we have seen (*e*), fully entitled to dispose of the land sold as his own, at any time after the making of the contract for sale.

Assignment of the benefit of the contract.

Either party to the contract may lawfully assign over his beneficial interest therein (*f*), and the assignee may sue the other party in his own name in equity for the specific performance of the contract, making the assignor a party to the action (*g*); and this is the case whether the assignment of the benefit of the contract be made for the purpose of absolutely transferring the assignor's whole interest or of securing some lesser or other advantage to the assignee, such as the repayment of money lent (*h*). And the assignee of the interest of either party to the contract is entitled, under the Judicature Act of 1873, to sue the other party thereon in his own name at law if the assignment were an absolute assignment in writing under the hand of the assignor (not purporting to be by way of charge only), and express notice in writing of such assignment were given to the other party (*i*). Notice of the assignment by either party of the benefit of the contract must, of course, be given to the other party, in order to prevent him from further performing the contract for the assignor's own use, which he would otherwise be entitled to do. And, as a rule, when one party to the contract receives notice of the assignment

(*e*) Above, pp. 482, 513.

(*f*) *Wood* v. *Griffith*, 1 Swanst. 43, 55, 56; Sug. V. & P. 356; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338; *Tolhurst* v. *Associated Portland, &c., Ltd.*, 1903, A. C. 414, 420, 423.

(*g*) *Nelthorpe* v. *Holgate*, 1 Coll. 203; and see *Crosbie* v. *Tooke*, 1 My. & K. 431; *Morgan* v. *Rhodes*, ib. 435; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345, 358; 12 L. J. (N. S.) Ch. 158, 162, 165; *Buckland* v. *Papillon*, L. R. 1 Eq. 477, 2 Ch. 67; Fry, Sp. Perf. § 222, 3rd ed.

(*h*) *Browne* v. *London Necropolis Co.*, 6 W. R. 188; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338-344, 350.

(*i*) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 6; *Torkington* v. *Magee*, 1902, 2 K. B. 427, reversed on the facts, 1903, 1 K. B. 644; and see *Dawson* v. *Great Northern Ry.*, 1905, 1 K. B. 260, 270, 271. It has been decided that where there is an absolute assignment of the chose in action (in the sense of a complete transfer of the legal ownership thereof), the assignee may sue in his own name, although the assignment be made to secure the payment of money, and be subject to a proviso for redemption on such payment: *Tancred* v. *Delagoa Bay, &c. Rail. Co.*, 23 Q. B. D. 239; *Durham* v. *Robertson*, 1898, 1 Q. B. 765; *Hughes* v. *Pump House, &c. Co.*, 1902, 2 K. B. 190; cf. *Mercantile Bank of London* v. *Evans*, 1899, 2 Q. B. 613; *Jones* v. *Humphreys*, 1902, 1 K. B. 10; or although the assignment be made on trust for the assignor: *Comfort* v. *Betts*, 1891, 1 Q. B. 737; *Fitzroy* v. *Cave*, 1905, 2 K. B. 364.

by the other of his interest in the contract, he is thenceforth bound to continue the performance of his part of the contract in favour of the assignee, and must no longer give to the assignor the benefit of the contract (*k*). But in order to oblige the other party to cease performance in favour of the original contractor, and to complete the contract with the assignee, there must be an effectual assignment of the orignal contractor's interest and notice of such assignment, and the assignee must show himself ready and willing to take the assignor's place in all respects, accepting the burthen, as well as the benefit, of the contract (*l*). Thus, where a purchaser of leaseholds deposited his contract with his bankers, together with a written agreement that he would at any time thereafter, at their request, execute to them a valid assignment of the contract, and the bankers gave formal notice to the vendor of the terms of this agreement only, not mentioning the deposit of the contract or expressing any intention to stand in the purchaser's place as regards its completion, and took no further steps to secure to themselves the benefit of the sale, it was considered that the terms of the agreement amounted, not to a present assignment of the benefit of the contract, but only to a promise to assign the same at a future time upon request; and it was held that the vendor was justified in executing, on payment of the purchase money by the original purchaser, a conveyance which took no notice of any interest on the banker's part (*m*).

Shaw v. *Foster*.

As to the burthen of the contract after an assignment.

Of course, neither party to the contract can assign over the burthen thereof (*n*). It follows that when one party to the contract has assigned his interest therein he remains liable to perform his part of the contract; and the other party cannot sue the assignee, either for the specific performance or for damages for breach of the contract (*o*), unless he has accepted the assignee as occupying the assignor's place, in respect of the fulfilment of the contract. In this case there appears in

(*k*) *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338, 339, 350; Wms. Pers. Prop. 37, 17th ed.

(*l*) See *Torkington* v. *Magee*, 1902, 2 K. B. 427, reversed on the facts, 1903, 1 K. B. 644.

(*m*) *Shaw* v. *Foster*, L. R. 5 H. L. 321.

(*n*) *Tolhurst* v. *Associated Portland Cement Manufacturers*, 1902, 2 K. B. 660, 668, affirmed, 1903, A. C. 414.

(*o*) *Chadwick* v. *Maden*, 9 Hare, 188.

truth to be a novation of the contract, and the assignor is not a necessary or proper party to any action thereon (*p*).

Transfer part of the benefit of the contract.

If a party to the contract make no direct assignment, either legal or equitable, of his whole interest in the contract, but merely transfer by some independent act or agreement a part of the benefit which he is to derive from its performance—as if the vendor merely charge the purchase money with the payment of some smaller amount, or the purchaser agree to sell a part or to lease the whole or a part of the land sold—the transferee, being no party to the contract and being unable to assert an absolute assignment to himself of the original contractor's interest within the meaning of the Judicature Act of 1873, is not entitled to sue the other party to the original contract in his own name at law (*q*). But, in equity, one who has acquired from an original contractor a derivative interest in the subject-matter of a contract which is specifically enforceable, may claim, as against his grantor and the other party to the contract, to be an assignee *pro tanto* of the benefit of the contract, and to have the same specifically performed in his own favour accordingly. Thus, in *Browne* v. *London Necropolis Co.* (*r*), a vendor of land assigned a portion of the purchase money by way of mortgage, the mortgagee deposited this mortgage with another by way of sub-mortgage, and the sub-mortgagee sued the purchaser, his own mortgagor and the vendor, claiming, as against the purchaser, the specific performance of the contract. Wood, V.-C., held that the suit was maintainable in this form, considering that any person who was an assignee of the vendor might assert the vendor's rights under the agreement to purchase, and thus obtain the benefit of his charge through the medium of specific performance. The same rule appears to be applicable in the case of the acquisition by a third person

Browne v. *London Necropolis Co.*

(*p*) *Holden* v. *Hayn*, 1 Mer. 47; *Hall* v. *Laver*, 3 Y. & C. 191.

(*q*) See above, p. 537; *Mercantile Bank of London* v. *Evans*, 1899, 2 Q. B. 613; *Jones* v. *Humphreys*, 1902, 1 K. B. 10. It is a question whether an absolute assignment by the vendor of part of the purchase money would enable the assignee to sue the purchaser at law; but the better opinion appears to be that it would not: see *Brice* v. *Bannister*, 3 Q. B. D. 569; *Durham* v. *Robertson*, 1898, 1 Q. B. 765, 769-775, and the two cases cited above; *Re Steel Wing Co., Ltd.*, 1921, 1 Ch. 349, and *Forster* v. *Baker*, 1910, 2 K. B. 636, not following *Skipper* v. *Holloway*, 1910, 2 K. B. 630 (reversed on the facts, ibid. 635, n. (*b*)).

(*r*) 6 W. R. 188, where, however, specific performance was refused on other grounds.

from the purchaser of an estate or interest in the land sold. But to obtain such relief the person claiming it must submit to perform the original contract, so far as any duty thereby created relates to the interest acquired by him in the subject-matter of the agreement, and he must also procure the whole of the obligations undertaken by his assignor in the contract to be completely discharged (*s*). For a contractor cannot, by a partial any more than by a complete (*t*) assignment of his interest under the contract, deprive the other party to the contract of his right to have the same performed in its entirety (*u*); and he can only enforce specific performance by the other party on the terms of carrying out his own part of the agreement (*x*).

Contract specifically enforceable against persons whose estate would be displaced by a conveyance.

Here it may be mentioned that contracts for sale of land are specifically enforceable, not only against the vendor's representatives in law and his assigns, who have or are taken to have notice of the contract, but also, as a rule, against all persons having any estate or interest in the land sold which would be displaced by the vendor's conveyance in pursuance of the contract (*y*). Thus, a contract for sale by a joint tenant of his share of the land is specifically enforceable against the other joint tenants claiming the estate by survivorship, the contract for sale operating in equity as a severance of the joint tenancy (*z*). And a contract for sale properly entered into by a trustee for or with power of sale is so enforceable against the *cestui-que-trusts* (*a*); but this is not the case if the circumstances were such as to make it a breach of trust for the trustee to enter into the contract (*b*). And where a trustee authorised

(*s*) *Dyer* v. *Pulteney*, Barn. Ch. 160, 169, 170; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338, 339, 350, 357, 358; and see *South Eastern Rail. Co.* v. *Knott*, 10 Hare, 122; *Fenwick* v. *Bulman*, L. R. 9 Eq. 165, where note that *Browne* v. *London Necropolis Co.* was not cited; *Government of Newfoundland* v. *Newfoundland Rail. Co.*, 13 App. Cas. 199, 210-213.

(*t*) Above, p. 539.

(*u*) Above, n. (*s*).

(*x*) Fry, Sp. Perf. § 922 *sq.*, 3rd ed.

(*y*) 2 Dart, V. & P. 997, 5th ed.; 1117, 6th ed.; 1031, 7th ed.; see above, pp. 511-513.

(*z*) *Hinton* v. *Hinton*, 2 Ves. sen. 631, 634; *Brown* v. *Raindle*, 3 Ves. 256, 257.

(*a*) *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52; *Mortlock* v. *Buller*, 10 Ves. 292, 314; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; above, pp. 241 *sq.*

(*b*) See *Mortlock* v. *Buller*, 10 Ves. 292, 313; *White* v. *Cuddon*, 8 Cl. & Fin. 766; *Maw* v. *Topham*, 19 Beav. 576, 578.

to invest the trust funds in the purchase of land has entered into a contract of purchase in such circumstances as to constitute a breach of trust, the contract is not specifically enforceable by the vendor against the *cestui-que-trusts*, notwithstanding that they have been in possession of the land under the contract or with the vendor's leave, and the vendor's only remedies to obtain payment of the purchase money are to sue the trustee at law and to enforce his vendor's lien (*c*).

(*c*) *Ecclesiastical Commrs.* v. *Pinney*, 1899, 2 Ch. 729; 1900, 2 Ch. 736. From what was said in the judgments in this case it appears that the vendor would not have had any remedy to obtain payment of the purchase money from the *cestui-que-trusts* or out of the trust fund if the contract had not been a breach of trust.

CHAPTER XII.

OF THE COMPLETION OF THE CONTRACT.

§ 1. Of Completion generally.
§ 2. Of Searches and Inquiries.
§ 3. Of the Preparation of the Conveyance.
§ 4. Of the Adjustment of Accounts.
§ 5. Of the Execution of the Conveyance.

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§ 1.—*Of Completion generally.*

Completion of the contract.

After the investigation of title is completed, the purchaser either accepts the title and proceeds to completion, or he objects to the title and claims that the vendor has failed to perform that part of the contract. In the latter case the vendor either admits the purchaser's claim or disputes it, when the parties must pursue their legal remedies. But if the purchaser accept the title, the contract is either duly completed or it fails to be performed either for non-payment of the purchase money or else for some reason which is not precisely a matter arising upon the investigation of title, as that the contract was induced by mistake or by misrepresentation as to some fact, or by fraud, duress or undue influence, or cannot or ought not to be performed by reason of the incapacity of some party thereto or of the relation in which the parties stand to each other. Of course, any of these matters may be alleged as a ground for avoiding the contract before or during the investigation of title. But as the plan of this treatise has been to take the normal course of a contract for the sale of land, and to describe the incidents thereof as they occur in order of time, we will first examine the cases in which the contract is duly completed, and will consider afterwards the various grounds on which the contract may be avoided.

Time for completion.

Let us now approach the subject of the completion of the contract in its ordinary course. And first, as to the time for completion. As we have seen (*a*), if when the investigation of title is concluded the vendor has shown a good title according to the contract, the purchaser is bound to accept the title and complete the contract accordingly. Under an open contract, the time for completion is when the vendor has shown a good title (*b*); but it is usual in formal contracts for the sale of land to fix a date for completion (*c*). When this is done, time is not, as a rule, of the essence of the contract, either in equity or, since the Judicature Acts commenced, at law (*d*). This rule, however, is subject to certain exceptions. The principle to which these exceptions are referable is the same as that on which the rule itself is founded (*e*). As the Court will enforce the specific performance of a contract, notwithstanding the failure to comply with some stipulation as to time, where it considers that the real intention of the parties was not to make the condition as to time material (*f*), so the Court will not order the specific performance of a contract after breach of a stipulation as to time, where the intention appears, either expressly or impliedly, that the observance of the time stipulation shall be an essential part of the contract (*g*).

When time of essence of contract.

A stipulation, therefore, that a contract for the sale of land shall be completed on a particular day will be of the essence of the contract, if such were the intention of the parties; and this intention may be either expressed or implied. An express intention to make time of the essence of the contract is best shown by providing (in these terms) that time shall be of the essence of the contract as regards the particular act required to be done within a given time (*h*); but such an intention may also be gathered from other expressions in the contract (*i*). It must,

(*a*) Above, pp. 34, 43, 149, 168. (*b*) Above, pp. 34, 43.
(*c*) Above, p. 52.
(*d*) Above, pp. 53, 54; *Patrick* v. *Milner*, 2 C. P. D. 342; *Stickney* v. *Keeble*, 1915, A. C. 386, 404, 417.
(*e*) See *Hipwell* v. *Knight*, 1 Y. & C. 401.
(*f*) Above, pp. 53, 54.
(*g*) See the cases cited above, p. 53; *Patrick* v. *Milner*, 2 C. P. D. 342; *Steedman* v. *Drinkle*, 1916, 1 A. C. 275; *Brickles* v. *Snell*, 1916, 2 A. C. 599.
(*h*) *Lloyd* v. *Rippingale*, cited 1 Y. & C. 410; *Parkin* v. *Thorold*, 16 Beav. 59, 65; *Brickles* v. *Snell*, 1916, 2 A. C. 599; see above, pp. 56, 65.
(*i*) *Hipwell* v. *Knight*, 1 Y. & C. 401, 417; *Barclay* v. *Messenger*, 43 L. J. N. S. Ch. 449, 455.

however, be clearly shown, or the general rule of construction, that time is not of the essence of an agreement to complete a sale of land on a given day, will be applied (*k*). With regard to the implication of an intention to make time of the essence of a contract to complete a sale of land on a particular day, we have seen (*l*) that such an intention may be inferred from the nature of the property or from the surrounding circumstances. Thus, time is of the essence of the contract where the value of the property sold must necessarily increase or diminish according to the effluxion of time (*m*), as in the case of sales of remainders or reversions other than those expectant merely on a lease at a profitable rent (*n*), of estates or interests determinable with life (*o*), or of mining leases or short leaseholds (*p*). So, where the property is used for trade or business purposes, time is generally of the essence of the contract (*q*); as on the purchase of a public-house (*r*), mill or manufactory as a going concern, or of mines for the purpose of working them (*s*). But in all these cases the question whether time is material is to be determined by ascertaining the intention of the parties (*t*); and if it appear from the contract that they contemplated delay in completion after the day fixed therefor, as where the payment of interest in case of delay in completion is expressly provided for (*u*), it will not be considered that compliance with the time stipulation is essential (*x*). As to inferring an intention to make time of the essence of the contract from the surrounding circumstances, this may be illustrated by the case of a contract to sell a house for the purpose of residence (*y*), or to sell land for erecting a mill or factory (*z*), or for any other immediate

(*k*) Above, p. 543; *Webb* v. *Hughes,* L. R. 10 Eq. 281, 286.
(*l*) Above, pp. 53, 54.
(*m*) *Hipwell* v. *Knight,* 1 Y. & C. 401, 416.
(*n*) Above, p. 392.
(*o*) See *Withy* v. *Cottle,* T. & R. 78; 1 Dart, V. & P. 419, 5th ed.; 484, 6th ed.; 497, 7th ed.
(*p*) *Hudson* v. *Temple,* 29 Beav. 536, 543.
(*q*) *Coslake* v. *Till,* 1 Russ. 376; *Walker* v. *Jeffreys,* 1 Hare, 341, 348.
(*r*) Above, p. 464.
(*s*) *Parker* v. *Frith,* 1 S. & S. 199, n.; *Macbryde* v. *Weekes,* 22 Beav. 533; Fry, Sp. Perf. §§ 1079-1082, 3rd ed.
(*t*) Above, p. 543.
(*u*) Above, pp. 61, 67.
(*x*) *Webb* v. *Hughes,* L. R. 10 Eq. 281, 286; *Patrick* v. *Milner,* 2 C. P. D. 342; and see *Jones* v. *Gardiner,* 1902, 1 Ch. 191.
(*y*) *Levy* v. *Lindo,* 3 Mer. 81, 84; *Gedye* v. *Montrose,* 26 Beav. 45; *Tilley* v. *Thomas,* L. R. 3 Ch. 61.
(*z*) See *Wright* v. *Howard,* 1 S. & S. 190.

purpose (*a*); but it does not appear that such an intention will be inferred where the vendor does not expressly or impliedly offer the property as available for the required purpose and the purchaser does not disclose to him what use he desires to make of it (*b*). An express or implied stipulation that time shall be of the essence of the contract may be waived either by express agreement or by the conduct of the parties, as where they continue negotiations as to title after the day fixed for completion (*c*).

Making time of the essence, where not originally so, by subsequent notice.

As we have seen (*d*), where time is not originally of the essence of the contract, it may be made so, in the case of unreasonable delay by either party in the performance of his part of the contract, by a notice served on him by the other party and requiring him to do the acts, which he has so delayed to perform, within a specified time; provided that the time so specified allow him such a period commencing from the date of service of the notice as, having regard to the circumstances of the case, is reasonably necessary for accomplishing the acts required.

Time for performance by vendor of a condition which is a term of the sale.

Here it may be mentioned that, if it be a term of the contract for sale that some condition shall be performed by the vendor, as that he shall procure a mortgagee of the land to allow the amount advanced to remain on the security, and a day be fixed for completion, time being of the essence of the contract in this respect, the vendor may, as a rule, well perform the condition at any time before the day fixed for completion (*e*).

The acts to be performed on either side for completion.

Completion of the contract consists on the part of the vendor in conveying with a good title the estate contracted for in the land sold and delivering up the actual possession or enjoyment thereof; on the purchaser's part it lies in accepting such title, preparing and tendering a conveyance for the vendor's execu-

(*a*) See *Jones* v. *Gardiner*, 1902, 1 Ch. 191.
(*b*) See *Boehm* v. *Wood*, 1 J. & W. 419, 422; *Tilley* v. *Thomas*, L. R. 3 Ch. 61, 67, 70; *Webb* v. *Hughes*, L. R. 10 Eq. 281, 286; *Stickney* v. *Keeble*, 1915, A. C. 386.
(*c*) *Hipwell* v. *Knight*, 1 Y. & C. 401; *Webb* v. *Hughes*, L. R. 10 Eq. 281; *Kilmer* v. *British Columbia Orchard Lands*, 1913, A. C. 319, explained in *Steedman* v. *Drinkle*, 1916, 1 A. C. 275, 279, 280, and *Brickles* v. *Snell*, 1916, 1 A. C. 599, 604, 605.
(*d*) Above, p. 45.
(*e*) *Smith* v. *Butler*, 1900, 1 Q. B. 694, 699.

tion, accepting such conveyance, taking possession and paying the price (*f*). But the performance of either party's duty in this respect cannot be exacted by the other unless he himself be ready to fulfil his own part of the contract; except only where the contract, either expressly or impliedly, otherwise provides (*g*). Thus the vendor cannot require payment of the price and call upon the purchaser to take possession unless and until he have shown a good title and be ready and willing to execute a valid conveyance to the purchaser; nor can the purchaser oblige the vendor to convey and give up possession of the land without himself accepting the title, tendering a conveyance for execution, accepting the conveyance and paying the price. And this is so, not only under an open contract, but also where a day is fixed for completion in the ordinary way, time not being of the essence of the contract; either party being at liberty in such case to decline to complete the contract, notwithstanding that the day for completion arrive or be past, except on the terms of the other discharging his duty (*h*).

The purchaser's duties.

Let us first consider the purchaser's duties. The first step towards completion required of him is to accept the title, if the title shown on the abstract and proved by the documents and other evidence produced for verification of the abstract be a good title according to the contract (*i*). No formal act or notification of such acceptance is required; it takes place when the vendor's last answer to the purchaser's last outstanding requisition is received without objection (*j*). Such acceptance, however, is merely an acceptance of the title so put forward by the vendor (*k*); it does not preclude objection to the title on account of defects subsequently discovered from other sources than the information supplied by the vendor, as from searches

Acceptance of the title.

(*f*) Above, pp. 27, 31-34, 43.

(*g*) *Mattock* v. *Kinglake*, 10 A. & E. 50; *Dicker* v. *Jackson*, 6 C. B. 103; *Lindsay* v. *Direct London and Portsmouth Ry.*, 19 L. J. Q. B. 417; *Yates* v. *Gardiner*, 20 L. J. Ex. 327; *Rutherford* v. *Acton-Adams*, 1915, A. C. 866, 868.

(*h*) See *Martin* v. *Smith*, 6 East, 555; *Jones* v. *Mudd*, 4 Russ. 118; *Poole* v. *Hill*, 6 M. & W. 835; *Tilley* v. *Thomas*, L. R. 3 Ch. 61; *Phillips* v. *Silvester*, L. R. 8 Ch. 173, 176-178; *Noble* v. *Edwardes*, 5 Ch. D. 378; *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376; *Stickney* v. *Keeble*, 1915, A. C. 386, 403; above, pp. 54, 155-157, n. (*d*), 491, 492.

(*i*) See above, pp. 34, 35, 97, 103, 131, 151, 168.

(*j*) See cases cited above, pp. 27, n. (*m*), 54, n. (*u*); *Re Highett and Bird's Contract*, 1902, 2 Ch. 214; 1903, 1 Ch. 287.

(*k*) Above, p. 176.

or other inquiries made by the purchaser (*l*), provided of course that the title agreed to be taken were not so limited by special stipulation as to preclude such objection (*m*). Neither does acceptance of the title prevent objections as to matters which are properly matters of conveyance rather than of title (*n*). It is important to observe this, as a part of the proper investigation of every title consists in searching for registered incumbrances, making inquiries of tenants or other occupiers as to the nature of their interests, or, where vacant possession is to be given on completion, ascertaining that the vendor is in possession; and these searches and inquiries should be so made as to extend over the very latest possible time before completion (*o*). And it may happen that an objection as to some matter of conveyance may be such as to justify the purchaser in refusing to complete the contract (*p*). We have seen (*q*) that the title may also be accepted by not sending in requisitions or objections within the time specially limited by the contract for that purpose. If the purchaser inadvertently accept a defective title put forward without fraud, and afterwards fail to pay the purchase money and the vendor rescind the contract and retain the deposit as forfeited on that account (*r*), the purchaser will not be enabled, on subsequently discovering the defect in the title, to recover the deposit (*s*).

Searches and inquiries to be made by the purchaser.

Acceptance by not sending in requisitions in time. *Soper* v. *Arnold.*

§ 2.—*Of Searches and Inquiries.*

The object of searching for incumbrances or other matters, which are registered or enrolled, is to ascertain that the vendor's title is not adversely affected by any judgment, Crown debt, writ or other process of execution, life annuity, land charge, *lis pendens*, bankruptcy, deed of arrangement, disentailing

Searches, their object.

(*l*) Above, pp. 176, 177; *Re Jackson and Oakshott*, 14 Ch. D. 851; *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666, 669, 670; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.

(*m*) Above, pp. 187-192.

(*n*) Above, pp. 150, 151, 170, 175, 177; *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595.

(*o*) Sug. V. & P. 538; Dart, V. & P. 454, 499, 5th ed.; 516 *sq.*, 569, 6th ed.; 1191, 1227, 7th ed.

(*p*) Above, pp. 151, 152, 170, 171; *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376.

(*q*) Above, pp. 169-171.

(*r*) See above, pp. 27, 35, 52, 67.

(*s*) *Soper* v. *Arnold*, 37 Ch. D. 96, 14 App. Cas. 429.

assurance, or deed acknowledged before the year 1883 by a married woman entitled at common law, or by registration of the title or any registered disposition under the Land Transfer Acts, 1875 and 1897 (*t*), or in the case of lands in Middlesex or Yorkshire, by any disposition thereof already registered (*u*), or in the case of copyholds by any assurance already enrolled (*x*).

Judgments, Crown debts and writs of execution.

With regard to judgments and Crown debts of record or by specialty in statutory form or arising from public accountantship to the Crown, all of which at one time were, when registered, charges on the debtor's lands (*y*), it is now provided by the Land Charges Act, 1900 (*z*), that a judgment (*a*) or recognizance, whether obtained or entered into on behalf of the Crown or otherwise, either before or after the commencement of the Act (*b*), shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under the Land Charges Act of 1888 (*c*); and this provision applies to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office from or under the Crown, whatever may have been its date, in like manner as it applies to a judgment (*d*). Under the same Act (*e*) too, no entry is to be made, except under an order of the High Court, in the register of judgments established by the Judgments Act, 1838 (*f*), the register of Crown debts established by the Judgments Act, 1839 (*g*), the registers of writs of execution established by the Law of Property Amendment Act, 1860 (*h*), and the Judgments Act, 1864 (*i*), or the register of Crown process of execu-

(*t*) Stats. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.
(*u*) Above, pp. 361 *sq.*
(*x*) See Wms. Real Prop. 287-318, 661-664, 23rd ed.
(*y*) Ibid. 289-294, 308-310.
(*z*) Stat. 63 & 64 Vict. c. 26, s. 2 (1).
(*a*) Here including any order or decree having the effect of a judgment, except an order made by a Court having bankruptcy jurisdiction in exercise of that jurisdiction: see sect. 6 (3); stat. 51 & 52 Vict. c. 51, s. 4.
(*b*) 1st July, 1901; stat. 63 & 64 Vict. c. 26, s. 6 (2).
(*c*) Stat. 51 & 52 Vict. c. 51.
(*d*) Stat. 63 & 64 Vict. c. 26, s. 2 (2); see Wms. Real Prop. 308-310, 23rd ed.
(*e*) Sect. 2 (3).
(*f*) Stat. 1 & 2 Vict. c. 110, ss. 19, 21.
(*g*) Stat. 2 & 3 Vict. c. 11, s. 8.
(*h*) Stat. 23 & 24 Vict. c. 38.
(*i*) Stat. 27 & 28 Vict. c. 112.

tion established by the Crown Suits Act, 1865 (*k*). And all these registers, as well as the registers of *lis pendens* and life annuities (*l*), have been transferred from the Central Office of the Supreme Court to the Office of Land Registry (*m*). As regards writs or other processes of execution, we have seen (*n*) that, by the Land Charges Act of 1888 (*o*), every writ or order affecting land (including hereditaments of any tenure) issued or made by any Court for the purpose of enforcing a judgment (*p*), and every delivery in execution or other proceeding taken in pursuance of any such writ or order is void, as against a purchaser for value (*q*) of the land, unless the writ or order is for the time being duly registered against the name of the person whose land is affected in the Office of Land Registry. This enactment was extended by the Land Charges Act, 1900 (*r*), to every writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, whether obtained on behalf of the Crown or otherwise, and whether obtained before or after the commencement of the Act, and to every delivery in execution or proceeding taken in pursuance of any such writ or order. Registration under these Acts ceases to have effect at the expiration of five years, but may be renewed, and if renewed has effect for five years from the date of renewal (*s*). With regard, therefore, to judgments, Crown debts or liabilities of the kind mentioned in the Land Charges Act, 1900, and process of execution, whether at suit of the Crown or of a common person, the purchaser now need only ascertain that no writ or order affecting the land sold has been registered or re-registered within the last five years; and if this be so, and the possession of the lands sold be in accordance with the title shown, he may safely complete the purchase (*t*). But if any such writ or order be registered, the

Writs and orders affecting land are void against purchasers for value, unless registered.

What the purchaser must now ascertain as to judgments, &c.

(*k*) Stat. 28 & 29 Vict. c. 104; see Wms. Real Prop. 291-294, 309, 310, 23rd ed.

(*l*) See below, pp. 554, 559.

(*m*) Stat. 63 & 64 Vict. c. 26, s. 1; and Order thereunder, W. N. 18th Aug. 1900.

(*n*) Above, p. 529.

(*o*) Stat. 51 & 52 Vict. c. 51, ss. 4-6.

(*p*) Above, p. 548, n. (*a*).

(*q*) Including a mortgagee or lessee, or other person who for valuable consideration takes any interest in or a charge on land: sect. 4.

(*r*) Stat. 63 & 64 Vict. c. 26, s. 3.

(*s*) Stat. 51 & 52 Vict. c. 51, s. 5 (3).

(*t*) It cannot now be necessary, as regards judgments suffered or Crown debts incurred before the commencement of the Land Charges

purchaser must not complete without the concurrence of every person entitled thereunder to any interest in the land (*u*). And this is the case whether such writ (*x*) have been followed by actual delivery in execution or not, as it has been held that the effect of the Land Charges Act, 1900 (*y*), read together with the unrepealed provisions of the Judgments Act, 1838 (*z*), is that a judgment operates as a charge on the judgment debtor's lands, when the writ or order for enforcing it has been registered under the Land Charges Act, 1888 (*a*), actual delivery in execution being no longer a condition precedent to the lien of a judgment (*b*). Upon such registration the charge attaches, according to the terms of the Judgments Act, 1838, upon all lands, tenements, and hereditaments to which the judgment debtor should at the time of entering up the judgment, or at any time afterwards, be seised or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, or expectancy, or over which he should at the time of entering up the judgment, or at any time afterwards, have any disposing power exercisable without the assent of any other

Judgments now operate as a charge when the writ or order of execution is registered.

Act, 1900, to search in any of the registers closed as above mentioned: p. 548. If before that Act any such judgments or debts were charges on any lands without the lands having been actually delivered in execution (as might happen in the case of a judgment entered up before the 23rd July, 1860, and kept alive by payment of interest or otherwise, or a Crown debt incurred before the 2nd Nov. 1865), it appears that on the commencement of that Act they ceased to be charges, unless or until a writ or an order to enforce them had been or should be registered. If the lands had been actually delivered in execution prior to that Act, it appears that, by virtue of sect. 3 of the Act (above, p. 549), unless the land had been already sold under the Judgments Act, 1864, it became necessary on the commencement of the Act of 1900 to register the writ or other process of execution, and that in default of such registration the delivery in execution would be void as against the purchaser. But the purchaser must ascertain that the possession of the land sold is in accordance with the title shown, because he is deemed to have notice of the interests of all persons in occupation thereof, and it may be held that, if the purchaser have notice of a delivery in execution under an unregistered writ or process, the same is valid in equity as against him: see below, p. 552.

(*u*) See above, pp. 528-530; *Ashburton* v. *Nocton*, 1915, 1 Ch. 274.

(*x*) An order appointing a receiver is of itself equivalent in equity to actual delivery in execution: below, p. 552, n. (*k*).

(*y*) 63 & 64 Vict. c. 26, s. 2.

(*z*) Stat. 1 & 2 Vict. c. 110, s. 13.

(*a*) Stat. 51 & 52 Vict. c. 51.

(*b*) *Ashburton* v. *Nocton*, 1915, 1 Ch. 274. Under the Judgments Act, 1864, no judgment thereafter entered up affected any land until actually delivered in execution. But this enactment was repealed by the Land Charges Act, 1900: see stats. 27 & 28 Vict. c. 112, s. 1; 63 & 64 Vict. c. 26, s. 5; Wms. Real Prop. 292-294, 296, 23rd ed.

person for his own benefit. And the charge is binding against the judgment debtor and all persons claiming under him after such judgment (*c*). And it has been further held that, on the registration of a writ of *elegit*, the judgment creditor's charge attaches upon the judgment debtor's lands, against which the writ of *elegit* cannot be executed owing to the legal estate therein being outstanding in a mortgagee, notwithstanding that in such case the judgment creditor would have to apply for an order for the appointment of a receiver in order to procure actual delivery in execution (*d*). So Crown debts of the kind included in the Land Charges Act, 1900 (*e*), have the binding effect on the debtor's lands which was given to them by common law or early statute (*f*), so soon as a writ or order for the purpose of enforcing them is registered. But as no charge now arises in the case of Crown debts of this kind, or of judgments, until registration of the writ or order, the purchaser will not be adversely affected by notice or knowledge of any of these Crown debts incurred by or any judgments against the vendor or his

Ashburton v. *Nocton.*

Notice of judgments, or Crown debts of record or by specialty or public accountantship.

(*c*) See stat. 1 & 2 Vict. c. 110, s. 13; Wms. Real Prop. 290, 315, 23rd ed. It was held that sects. 13 and 19 of this Act did not have a retrospective effect in making judgments a charge, after the registration of the judgment, upon lands to which the judgment debtor was entitled at the time of entering up the judgment, but not at the date of its registration; *Hargrave* v. *Hargrave*, 23 Beav. 484. It is thought that the principle of this decision is applicable under the present law, and that it would be held that judgments are not charges on lands, to which the judgment debtor was entitled at the date of the judgment, but not at the date of the registration of the writ or order for enforcing it. As regards a judgment debtor's equitable estates in land, on which judgments are by sect. 13 of this Act charged, it is provided in that enactment that nothing therein contained shall alter or affect any doctrine of Courts of equity whereby protection was given to purchasers for valuable consideration without notice; and this proviso still remains in force. This doctrine protected purchasers for value, who obtained the legal estate in land without notice of judgments affecting only the equitable estate therein, against the equitable charges created by such judgments; but since the Judgments Act, 1838, this doctrine has been applicable only in the case of the judgment debtor's equitable estates which are *not* extendible by sect. 11 of that Act under a writ of *elegit*, such as his equities of redemption; and it affords no protection against judgments charged on his equitable estates, which *are* so extendible, such as those arising under a simple trust for his benefit. See *Greswold* v. *Marsham*, 2 Ch. Ca. 170; *Tunstall* v. *Trappes*, 3 Sim. 286, 296; Sug. V. & P. 517-527, 533-536; Lewin on Trusts, 652-654, 6th ed.; 1 Dart, V. & P. 461, 5th ed.; Wms. Real Prop. 313-315, 23rd ed.

Judgments thought not to be a charge on lands conveyed away before registration of the writ or order.

Protection to purchasers of the legal estate, without notice of judgments charged on some equitable estate *not* extendible by *elegit*.

(*d*) *Ashburton* v. *Nocton*, 1915, 1 Ch. 274 (Cozens-Hardy, M. R., and Swinfen Eady, L. J., *diss.* Kennedy, L. J., reversing Sargant, J., *S. C.*, 1914, 2 Ch. 211); see Wms. Real Prop. 294, n. (*y*), 315, 316, 23rd ed.

(*e*) See above, p. 550, n. (*y*); and p. 548.

(*f*) See Wms. Real Prop. 308, 23rd ed.

Crown debts by simple contract.

predecessors in title, so long as the purchase is completed before such registration takes place. Debts due to the Crown by simple contract and not arising from the above-mentioned accountantships (*g*) did not, under the old law, give rise to any lien on the debtor's lands until they were made of record for the purpose of enforcing them (*h*); and they do not now give rise to such a lien. The purchaser may therefore safely disregard these liabilities of the vendor, notwithstanding that he have notice of them; they could only affect him if his purchase were made, not in good faith, but with intent to defraud the Crown (*i*).

Notice of unregistered process of execution.

With regard to unregistered process of execution against lands, it is to be observed that the same is made void only as against purchasers for value (*j*). The actual delivery of any lands in execution, under an unregistered writ of *elegit* or receiving order, still vests in the judgment creditor an estate by *elegit*, which is valid as against the judgment debtor himself, his representatives in law and assigns by voluntary conveyance (*k*). It appears therefore that the actual delivery in

(*g*) Above, p. 548.

(*h*) *R.* v. *Smith*, Wightw. 34; *Casberd* v. *A.-G.*, 6 Price, 411, 473-476; Chitty on the Prerogative of the Crown, 293-296; Sug. V. & P. 545.

(*i*) Sug. V. & P. 545.

(*j*) Above, p. 549.

(*k*) See above, p. 529. The estate by *elegit* vests in the judgment creditor, in the case of execution under a writ of *elegit*, when he has got the sheriff's return to the writ, and in the case of equitable execution by the appointment of a receiver, when the order for a receiver is made. In the case of an *elegit*, the sheriff delivers to the judgment creditor symbolical not actual possession of the land; but the latter, when tenant by *elegit*, may, if the land were in the occupation of a tenant, distrain for rent subsequently becoming due without any attornment by such tenant. And if the land were in the judgment debtor's own occupation, the tenant by *elegit* may obtain actual possession thereof by peaceable entry or by action: see *Hoe's case*, 5 Rep. 89b; *Taylor* v. *Cole*, 3 T. R. 292, 295; *Rogers* v. *Pitcher*, 6 Taunt. 202, 206, 207; *Sharp* v. *Key*, 8 M. & W. 379; *Lloyd* v. *Davies*, 2 Ex. 103; *Hughes* v. *Lumley*, 4 E. & B. 274; *Guest* v. *Cowbridge Ry. Co.*, L. R. 6 Eq. 619; *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 236; *Re Pope*, 17 Q. B. D. 743, 745, 751; *Re Anthony*, 1892, 1 Ch. 450; *Johns* v. *Pink*, 1900, 1 Ch. 296. It is submitted that the case of *Re Hobson*, 33 Ch. D. 493, if well decided, which is doubtful, lays down no more than this: that the symbolical delivery of land by the sheriff under an *elegit* may be equivalent to a "seizure" thereof within the meaning of sect. 45 (2) of the Bankruptcy Act, 1883, now replaced by sect. 40 (2) of the Bankruptcy Act, 1914. It appears that a judgment creditor, who has obtained actual delivery in execution of the judgment debtor's lands under unregistered process, is entitled to obtain an order for sale under the Judgments

execution under unregistered process of lands sold, whether made before or pending the completion of the contract for sale, is an objection to the title, the estate sold being partly vested in some person, whom the vendor has no right to direct to convey to the purchaser (*l*); and it seems by analogy to the rule applied under the old law as to the sale of lands already parted with by voluntary conveyance (*m*), that the vendor could not enforce the specific performance of the contract, upon the ground that conveyance to the purchaser would render the execution void. Nor could the purchaser himself be advised to rely upon this ground and accept the title, if he had notice of the execution; for it may be argued that, on the principle applied in the case of unregistered conveyances of lands in Middlesex or Yorkshire (*n*), of undocketed judgments under the old law (*o*), and of unregistered life annuities under the Judgments Act, 1855 (*p*), executions actually put in force against lands under unregistered process are valid in equity as against purchasers who have notice of the same. Until this point be precisely decided, the purchaser should, it is conceived, refuse to complete in such a case, except with the concurrence of every person interested by virtue of the execution in the land sold (*q*).

Orders made in exercise of bankruptcy jurisdiction.

It will have been observed (*r*) that the provisions of the Land Charges Acts, 1888 and 1900, do not apply to orders made by a Court having jurisdiction in bankruptcy in the exercise of that jurisdiction. Such orders, if made for the payment of any sum of money, or any costs, charges or expenses, appear to have the effect of a judgment (*s*), and therefore to

Act, 1864 (stat. 27 & 28 Vict. c. 112), s. 4, as the words in that enactment which required registration of the process of execution as a condition precedent to obtaining an order for sale were repealed by the Land Charges Act, 1900 (stat. 63 & 64 Vict. c. 26), s. 5.

(*l*) Above, pp. 150-152.

(*m*) Above, p. 378, n. (*d*).

(*n*) Above, p. 361; Wms. Real Prop. 222, 223, 23rd ed.

(*o*) *Davis* v. *Strathmore*, 16 Ves. 419; Sug. V. & P. 521.

(*p*) *Greaves* v. *Tofield*, 14 Ch. D. 563. The language used in the Judgments Act, 1855, is different from that used in the Land Charges Act, 1888. But *Greaves* v. *Tofield* was expressly decided on the principle applied in construing the Middlesex and Yorkshire Registry Acts, of which the language closely resembles that of the Land Charges Act, 1888.

(*q*) See above, pp. 528-530. (*r*) Above, p. 548, n. (*a*).

(*s*) See stats. 1 & 2 Vict. c. 110, s. 18; 4 & 5 Geo. V. c. 59, ss. 96, 103, replacing 46 & 47 Vict. c. 52, ss. 92, 93, 100; R. S. C. 1883, Orders 42 (rr. 3, 24, 28), 43 (r. 1); Bankruptcy Rules, 1915, r. 91.

operate as a charge on the lands of the person ordered to pay (*t*); but all the enactments which rendered registration of the order, or of the writ of execution or actual delivery in execution, a condition precedent to such lien have been repealed (*u*). Such orders may be made, for example, where one who has contracted with a person afterwards adjudged bankrupt applies in the bankruptcy for rescission of the contract and is ordered to pay damages or costs (*v*). There do not appear to be any means of discovering whether lands sold are affected by a liability of this kind.

Annuities or rent-charges.

Annuities or rent-charges which may affect purchasers of land are of two kinds, those granted in exercise of the ordinary right of alienation incident to ownership, and those created under statutory authority, generally for the purpose of securing the repayment of money advanced for the improvement of land. Of annuities of the former kind, those granted on or after the 26th of April, 1855, otherwise than by marriage settlement or will, for a life or lives or for any estate determinable on a life or lives, are required to be registered, formerly in the Court of Common Pleas and now in the Office of Land Registry, in order to affect the lands charged therewith as against purchasers (*x*). Life annuities so required to be registered are, however, valid in equity, though unregistered, as against purchasers who have notice of them (*y*). Annuities or rent-charges of the former kind, other than those so required to be registered, of course take effect according to their nature; if legal, they will affect the lands charged in the purchaser's hands; if equitable, the purchaser will take the lands free from them, only so far as he can claim under a conveyance of the legal estate made

Notice of life annuities.

(*t*) Stat. 1 & 2 Vict. c. 110, s. 13.

(*u*) Stat. 63 & 64 Vict. c. 26, s. 5.

(*v*) Above, p. 526. An example of an appeal made by a contractor with a bankrupt to bankruptcy jurisdiction and dismissed with costs against him occurs in *Re Bastable*, 1901, 2 K. B. 518.

(*x*) Stat. 18 & 19 Vict. c. 15, ss. 12, 14; above, pp. 419, 549. Annuities for or determinable on any life or lives, granted for valuable consideration, and not secured on lands of equal or greater value than the annuity, and belonging to the grantor for an estate in fee or in tail in possession, were formerly made void by statute, unless a memorial thereof were duly enrolled in the Court of Chancery: stats. 17 Geo. III. c. 26; 53 Geo. III. c. 141; 3 Geo. IV. c. 92; 7 Geo. IV. c. 75. But these statutes were repealed by the Act abolishing the Usury Laws: stat. 17 & 18 Vict. c. 90.

(*y*) *Greaves* v. *Tofield*, 14 Ch. D. 563.

in good faith and for executed valuable consideration without notice of them, and not otherwise (*z*). If any such rent-charges exist, they ought to be stated on the abstract (*a*): but if not so disclosed, they are not generally discoverable either by any search, or by the absence of the title deeds, as a person having a rent only is not entitled to the custody of the title deeds of the land charged therewith (*b*).

Land charges.

With regard to rent-charges of the latter kind, those coming under the description of a land charge (*c*) in the Land Charges Act, 1888 (*d*), and created after that year, are void as against a purchaser for value (*e*) of the land charged therewith, unless registered in the register of land charges at the Office of Land Registry. And rent-charges coming under the same description and created before the year 1889, but assigned over by act *inter vivos* after the year 1888, are not recoverable after the expiration of one year from the first of such assignments, as against a purchaser for value (*e*) of the land charged therewith, unless registered in the same register (*f*). As it may be contended that land charges so required to be registered are valid in equity as against purchasers who have notice of them (*g*), purchasers cannot be advised to disregard any such charges, though not registered, of which they have notice. Land improvement charges created by the authority of statute before the year 1889 were not declared to be void, as against purchasers, if not registered; but some of them were required to be registered and are discoverable by search. Thus, charges created under the Public Money Drainage Acts (*h*), the Private Money Drainage Act, 1849 (*i*), or the Improvement of Land Act,

Notice of unregistered land charges.

Land improvement charges created before 1889.

(*z*) Above, pp. 535, 536; *Clemow* v. *Geach*, L. R. 6 Ch. 147.
(*a*) See above, pp. 97, 165.
(*b*) Wms. Real Prop. 462, 13th ed.; 657, 23rd ed.
(*c*) Stated above, p. 419, n. (*a*).
(*d*) Stat. 51 & 52 Vict. c. 51, s. 12.
(*e*) Above, p. 549, n. (*q*).
(*f*) Sect. 13.
(*g*) See above, p. 553, and n. (*p*).
(*h*) These charges were to be made by certificate of the Inclosure Commissioners, and to consist of rent-charges payable for twenty-two years: stats. 9 & 10 Vict. c. 101 (see s. 34), amended by 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 12 & 13 Vict. c. 100, ss. 30, 31 (repealed by 27 & 28 Vict. c. 114); 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9.
(*i*) These consist of rent-charges payable for twenty-two years and granted by certificate of the Inclosure Commissioners, and, if charged on lands in Middlesex or Yorkshire, were to be registered in the county register: stat. 12 & 13 Vict. c. 100 (see ss. 10, 14), amended by 19 & 20 Vict. c. 9, and repealed by 27 & 28 Vict. c. 114.

1864 (*k*), before the year 1889, were registered against the name of the landowner affected thereby at the office of the Inclosure Commissioners, afterwards styled the Land Commissioners (*l*), whose powers and duties were in the year 1889 transferred to the Board of Agriculture (*m*). This Board was subsequently styled the Board of Agriculture and Fisheries, and is now replaced by the Ministry of Agriculture and Fisheries (*n*), at whose office the search for such charges should be made (*o*). Land improvement charges created under the General Land Drainage and Improvement Company's Act (*p*), the Lands Improvement Company's Acts (*q*), or the Land Loan and Enfranchisement Company's Act (*r*) may also be discovered by search at the office of the Ministry of Agriculture and Fisheries, as well as by search at the companies' offices respectively (*s*). Charges under the Artisans' and Labourers' Dwellings Acts, 1868 to 1882 (*t*), in favour of owners who themselves completed

(*k*) These were to be made by absolute order of the Inclosure Commissioners creating a rent-charge for the term thereby fixed, not exceeding twenty-five years: stat. 27 & 28 Vict. c. 114 (see ss. 26, 49), amended by 62 & 63 Vict. c. 46, and extended by 33 & 34 Vict. c. 56 and 34 & 35 Vict. c. 84 to the erection, completion or improvement of limited owners' residences; by 40 & 41 Vict. c. 31 to waterworks; by 45 & 46 Vict. c. 38, s. 30 to all improvements authorised by the Settled Land Act, 1882; and by 60 & 61 Vict. c. 44 to the supply of water to a rural district. Under the Act of 1864 (sect. 56) the rent-charges thereby created were required to be registered in the Office of Land Registry; but the words requiring this were repealed by stat. 62 & 63 Vict. c. 46, s. 5, which also prohibited any entry *or search* from being made in any register kept at the Office of Land Registry under sect. 56 of the Act of 1864, except under an express order of the High Court. This does not appear to prohibit search at the Office of the Ministry of Agriculture and Fisheries.

(*l*) Stat. 45 & 46 Vict. c. 38, s. 48.

(*m*) Stat. 52 & 53 Vict. c. 30.

(*n*) See above, p. 134, n. (*z*).

(*o*) See Elphinstone & Clark on Searches, 109-112; above, n. (*k*).

(*p*) These were to be created by absolute order of the Inclosure Commissioners: stat. 12 & 13 Vict. c. xci. (see s. 56) (local and personal).

(*q*) These were to be created by absolute order of the Inclosure Commissioners charging the lands by way of annuity for not more than twenty-five years; and, if affecting lands in Middlesex or Yorkshire, were to be registered in the county register: stat. 16 & 17 Vict. c. cliv. (see ss. 48, 54), amended by 18 & 19 Vict. c. lxxxiv.; 22 & 23 Vict. c. lxxxii.; and 26 & 27 Vict. c. cxl. (local and personal Acts).

(*r*) These are rent-charges for terms not exceeding twenty-five years created by absolute order of the Inclosure Commissioners, and, if affecting lands in Middlesex or Yorkshire, were to be registered in the county register: stat. 23 & 24 Vict. c. clxix. (see ss. 37, 38, 47), amended by 23 & 24 Vict. c. cxciv. (local and personal).

(*s*) Elphinstone & Clark on Searches, 117-119; above, p. 555.

(*t*) These charges were made by order of the local authority charging the lands with an annuity for thirty years, and, if affecting lands in

the works required under the Acts by the local authority, had to be recorded and may be discovered by search at the office of the Clerk of the Peace for the county in which the lands affected lie; where also may be found evidence of any charges created under the Landowners Drainage and Improvement Company's Act (*u*) and the Landowners West of England and South Wales Land Drainage Company's Act (*x*). Charges under the Sewers Amendment Act, 1833 (*y*), will be found registered in the Court of Sewers, if any, for the district; or, if made by a drainage board constituted under the Land Drainage Act, 1861 (*z*), at the office of the Board (*a*). Rent-charges granted under the Public Health Act, 1875 (*b*), for securing the repayment of money advanced for private improvement expenses, are required to be registered and may be discovered by search at the office of the local authority. There are also some cases in which charges authorised by Local Improvement Acts are required to be registered (*c*).

Land improvement charges not requiring registration before 1889.

Amongst land improvement rent-charges which did not before the year 1889 require any registration of any kind, are those created under stat. 8 & 9 Vict. c. 56 (*d*). Various local

Middlesex or Yorkshire, were required to be registered in the county register. Where the local authority themselves executed the works, the costs, charges and expenses so incurred might be charged on the lands by order of the Court of Quarter Sessions: see stats. 31 & 32 Vict. c. 130 (see ss. 19, 25-30); 38 & 39 Vict. c. 36; 42 & 43 Vict. cc. 63 and 64; 43 Vict. c. 8; 45 & 46 Vict. c. 54; all repealed by the Housing of the Working Classes Act, 1890 (stat. 53 & 54 Vict. c. 70): see ss. 36, 37, as to charging orders in favour of owners completing works themselves, which are to be registered in Middlesex or Yorkshire in the county register.

(*u*) Stat. 10 & 11 Vict. c. ccxii.

(*x*) Stat. 11 & 12 Vict. c. cxlii.; this company was ordered to be wound up in 1874: see *Landowners West of England, &c. Co.* v. *Ashford*, 16 Ch. D. 411, 424; Elphinstone & Clark on Searches, 119, 120.

(*y*) These are made by a decree or Ordinance of the Commissioners of Sewers and are payable by instalments over a period not exceeding fourteen years: stat. 3 & 4 Will. IV. c. 22 (see s. 41).

(*z*) Stat. 24 & 25 Vict. c. 133, s. 67.

(*a*) Elphinstone & Clark on Searches, 114, 115.

(*b*) These are granted by the local authority by way of rent-charge for a term not exceeding thirty years: stat. 38 & 39 Vict. c. 55, ss. 240, 241.

(*c*) As those created under the Improvement of Buildings Act, 1860 (c. cxxix.), as to lands in Middlesex, the Bradford Waterworks and Improvement Act, 1875 (c. lxxx.), and the Leeds Improvement Act, 1877 (c. clxxviii.), where registration in the county register is required; Elphinstone & Clark on Searches, 121, 123.

(*d*) Enabling the repayment, by instalments extending over not more than twenty-five years, of moneys expended in the improvement of

Acts have also authorised the creation of rent-charges to repay money advanced for improvements, without the requirement of registration (*e*).

Statutory charges on land of a principal sum, not payable by way of annuity.

Besides the land improvement charges payable by way of terminable annuity, there are other statutory charges on land of some principal sum not so payable; and these were not required to be registered. Among such charges are those given by the Public Health Act, 1875 (*f*), to secure the repayment with interest of the amount of the expenses incurred by any local authority under the Act (*g*), for the repayment whereof the owner of the premises, for or in respect of which the expenses were incurred, is made liable either under the Act or by agreement with the local authority. Similar charges have been created by various local Acts, sometimes by express words, sometimes impliedly, as by giving power to distrain for the amount due (*h*). The charges given under the Agricultural Holdings (England) Act, 1883 (*i*), to a landlord who had paid to a tenant compensation under that Act and where the landlord was not entitled for his own benefit, also required no registration.

What are *land charges* created after 1888.

It appears that all the land improvement rent-charges created after the year 1888, at the instance of the owners of the land under any of the above-mentioned Acts, come within the description of land charges contained in the Land Charges Act of 1888 (*k*), and must be registered accordingly in order to be effectual as against a purchaser for value of the land charged.

settled estates to be charged thereon with the sanction of the Court of Chancery; but apparently seldom resorted to: Elphinstone & Clark on Searches, 115.

(*e*) See Elphinstone & Clark on Searches, 121 *sq.*

(*f*) Stat. 38 & 39 Vict. c. 55, s. 257: see *Corpn. of Birmingham* v. *Baker*, 17 Ch. D. 782; *Re Bettesworth and Richer*, 37 Ch. D. 535; *Re Smith's Settled Estates*, 1901, 1 Ch. 689; above, pp. 165, 497.

(*g*) As in sewering, paving or lighting private streets under sect. 150 of the Act.

(*h*) See Elphinstone & Clark on Searches, 121 *sq.*; above, pp. 165, 497.

(*i*) Stat. 46 & 47 Vict. c. 61, ss. 29, 31.

(*k*) Above, pp. 419, n. (*a*), 555. It is conceived that where the charges are created by order or certificate of the Inclosure Commissioners, Land Commissioners, Board of Agriculture, or Board or Ministry of Agriculture and Fisheries, or other body, given under statutory authority, they are not charged by deed within the meaning of sect. 4 of the Land Charges Act, 1888, though such order or certificate be directed to be made under hand and seal: see above, pp. 555-557.

So, it seems, must any other land improvement charge effected under the same Acts at the instance of the owner of the land, but not payable by way of annuity (*l*). The above-mentioned charge given by the Agricultural Holdings (England) Act, 1883, in favour of a landlord, who had paid compensation, was expressly included in the definition of a land charge given in the Land Charges Act of 1888 (*m*). And by an Act of 1890 (*n*) it was provided that the charge given by the Agricultural Holdings Act of 1883, where the landlord was not entitled for his own benefit, should be a land charge within the meaning of the Land Charges Act of 1888, and should be registered accordingly. And similar charges created under the Agricultural Holdings Act, 1908 (*o*), or the Acts amending it (*p*), are also made land charges under the Act of 1888 and required to be registered in the same manner. But it has been held that the charges given by sect. 257 of the Public Health Act, 1875 (*q*), and similar charges imposed by statute on lands against their owner's will (*r*), are not land charges within the meaning of the Land Charges Act of 1888 (*s*), and do not, since that Act, require to be registered (*t*). A charge similar to that given by sect. 257 of the Public Health Act, 1875 (*q*), was authorised by the Private Street Works Act, 1892 (*u*): but a register of these charges is required to be kept by the urban authority.

Lis pendens.

With regard to the other matters above referred to (*v*) in enumerating the objects of searches:—Under the Judgments Act, 1839 (*x*), no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof unless registered and re-

(*l*) See *R.* v. *Vice-Registrar of Office of Land Registry*, 24 Q. B. D. 178.
(*m*) Above, p. 419, n. (*a*).
(*n*) Stat. 53 & 54 Vict. c. 57, s. 3.
(*o*) Stat. 8 Edw. VII. c. 28 (which consolidated and repealed the Act of 1883 and its amending Acts), s. 19; see ss. 15-18, 35; Wms. Real Prop. 580, 581, 23rd ed.
(*p*) Stats. 4 & 5 Geo. V. c. 7 (repealed by the Act next cited); 10 & 11 Geo. V. c. 76, ss. 10 *sq.*, 36 (2, 3).
(*q*) Above, p. 558.
(*r*) Above, pp. 165, 497.
(*s*) Above, p. 419, and n. (*a*).
(*t*) *R.* v. *Vice-Registrar of Office of Land Registry*, 24 Q. B. D. 178.
(*u*) Stat. 55 & 56 Vict. c. 57, s. 13; *Stock* v. *Meakin*, 1900, 1 Ch. 683; above, pp. 165, 497.
(*v*) Above, p. 547.
(*x*) Stats. 2 & 3 Vict. c. 11, s. 7; 42 & 43 Vict. c. 78; R. S. C. 1883, Ord. 61; above, p. 548.

registered every five years in the Office of Land Registry. The purchaser should therefore search the register of pending suits for the last five years to find out if any legal proceedings affecting the property sold are entered therein. And as he will be bound by the result of any action at law or in equity affecting the property sold, which is so registered, or of which, though not so registered, he has *express notice* (*y*), he should, if any such action be proceeding, refuse to complete without the concurrence of all persons asserting therein any apparently well-founded claim on the property. It should be noted, however, that registration or express notice of a *lis pendens* against the vendor is not necessarily notice of an incumbrance on the land sold, for the suit in question may not affect the land (*z*). It is merely notice of a claim, and makes it necessary for the purchaser to inquire into the nature of the claim. And if the claim sought to be enforced be such as would create no charge on the land sold, the purchaser cannot refuse to complete the contract (*a*). Where the land sold is situate in either of the counties palatine of Lancaster and Durham, the index of pending suits in the Palatine Courts (*b*) must also be searched (*c*).

Lands in Lancashire or Durham.

Bankruptcy.

Searches in bankruptcy are of course made to discover if the title to the lands sold has been affected by reason of their vesting under bankruptcy proceedings against the vendor or some former owner, either in the trustee in the bankruptcy or in the trustee appointed to carry out a composition or scheme of arrangement approved by the Court (*d*). By the Deeds of

(*y*) Co. Litt. 344 b; *Anon.*, 1 Vern. 318; *Hiern* v. *Mill*, 13 Ves. 114, 120; *Bellamy* v. *Sabine*, 1 De G. & J. 566; *Price* v. *Price*, 35 Ch. D. 297; *Dunn* v. *Chapman*, 1920, 2 Ch. 474.

(*z*) See above, p. 207.

(*a*) *Bull* v. *Hutchens*, 32 Beav. 615.

(*b*) See Wms. Real Prop. 297 and n. (*c*), 23rd ed.

(*c*) Stat. 18 & 19 Vict. c. 15, s. 3.

(*d*) See above, pp. 518-521; stat. 4 & 5 Geo. V. c. 59, ss. 16 (17, 18), 38, replacing 53 & 54 Vict. c. 71, s. 3 (16, 17), and 46 & 47 Vict. c. 52, s. 44. An order of adjudication in bankruptcy does not require to be registered in Middlesex in order to pass the lands there situate to the trustee: *Re Calcott and Elvin's Contract*, 1898, 2 Ch. 460. But as to land in Yorkshire, it appears that under the Yorkshire Registries Act, 1884, a trustee in bankruptcy must register the order of adjudication in order to secure for himself priority over all persons who might claim under a subsequent registered conveyance from the debtor; see stat. 47 & 48 Vict. c. 54, ss. 3, 4, 6 (3), 14; above, p. 364, and n. (*b*).

Deeds of Arrangement.

Arrangement Act, 1914 (*e*), any instrument of the following classes made otherwise than in pursuance of the bankruptcy law for the time being in force, whether under seal or not, by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally, or by, for, or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more of his creditors (*f*), is void, unless registered in the Bills of Sale Department of the Central Office of the Supreme Court (*g*) within seven days after the first execution thereof by the debtor or any creditor (*h*), and unless stamped in accordance with the Act. These classes of instrument are an assignment of property, a deed of or agreement for a composition, and in cases where creditors of the debtor obtain any control over his property or business, a deed of inspectorship, letter of licence, and any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise, or dispose of the debtor's business with a view to the payment of his debts. And by the same Act (*i*), every such instrument of arrangement is void unless it has received the assent of a majority in number and value of the creditors within twenty-one days, or such extended time as the Court may allow, after the registration thereof. By the Land Charges Act, 1888 (*j*), every deed of arrangement, whether made before or after the commencement of that Act, is void as against a person becoming

(*e*) Stat. 4 & 5 Geo. V. c. 47, ss. 1, 2, 4, 5, replacing 50 & 51 Vict. c. 57 (except as it related to Ireland), 53 & 54 Vict. c. 71, s. 25, and 3 & 4 Geo. V. c. 34, ss. 27-41, and part of s. 42 and Sched. II.

(*f*) Instruments of arrangement not made for the benefit of creditors *generally* were first required to be registered by stat. 3 & 4 Geo. V. c. 34, s. 37, which commenced 1st April, 1914: sect. 42 (2); see *Re Saumarez*, 1907, 2 K. B. 170; cf. *Re Allix*, 1914, 2 K. B. 77.

(*g*) In Ireland the place of registration was the Bills of Sale Office of the King's Bench Division: stat. 50 & 51 Vict. c. 57, s. 8.

(*h*) Others may execute the deed after registration: *Re Batten, Ex parte Milne*, 22 Q. B. D. 685. Instruments executed out of England or Ireland may be posted within one week after execution, and registered within seven days after arrival in the ordinary course of post: see stat. 4 & 5 Geo. V. c. 47, s. 2, replacing 50 & 51 Vict. c. 57, s. 5.

(*i*) Stat. 4 & 5 Geo. V. c. 47, s. 3, replacing 3 & 4 Geo. V. c. 34, s. 28 (1). The Court is the High Court or the Court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the instrument.

(*j*) Stat. 51 & 52 Vict. c. 51, ss. 2, 4, 7-9. Such a deed need not, since the passing of the Land Charges Act, 1900, be registered in the Middlesex Registry: stat. 63 & 64 Vict. c. 26, s. 4.

after the year 1888 a purchaser for value (*k*) of any land comprised therein or affected thereby, unless registered in the Office of Land Registry. In that Act (*l*), "deed of arrangement" has the same meaning as in the Deeds of Arrangement Act, 1887 (*m*). Search in bankruptcy and for deeds of arrangement should never be omitted where it is known or there is reason to suspect that the vendor or any former owner is or has been in embarrassed circumstances (*n*); and having regard to the difficulties occasioned where bankruptcy proceedings have taken place unknown (*o*), it appears desirable to search in bankruptcy on every sale. And the same remark applies to searching for deeds of arrangement.

Disentailing assurances.

Search for disentailing assurances is only necessary where the title depends on the fact of some estate tail, vested in a person of full age, *not* having been barred. It is only requisite to search for certificates of the acknowledgment of deeds by married women where title is made through some married woman entitled to the land sold at common law, and there is reason to suppose that some disposition, inconsistent with the abstracted title, has been made by her before the year 1883 by deed acknowledged (*p*) and has been suppressed (*q*). Both these searches are now made, as to assurances under the Fines and Recoveries Act, 1833 (*r*), at the Central Office of the Supreme Court (*s*); whilst the records of fines and recoveries are preserved in the Public Record Office (*t*). The object of searching, on the sale of unregistered land, in such of the registers established by the Land Transfer Acts, 1875 and

Deeds acknowledged.

Search to ascertain if the title is registered.

(*k*) Above, p. 549, n. (*q*).
(*l*) Stat. 51 & 52 Vict. c. 51, s. 4.
(*m*) Stat. 50 & 51 Vict. c. 57, s. 2 (2), in which a deed of arrangement was defined as above, but only where made for the benefit of creditors *generally;* see above, p. 561, note (*f*). It seems, therefore, that the provisions of the Land Charges Act, 1888, apply only to instruments which are deeds of arrangement under the Acts of 1887 and 1914 for the benefit of creditors *generally,* and not to those which, being made for the benefit of three or more creditors, are deeds of arrangement under the Acts of 1913 and 1914 only.
(*n*) See *Cooper* v. *Stephenson,* 16 Jur. 424, 21 L. J. Q. B. 292.
(*o*) See the cases cited above, pp. 522, n. (*a*), 524, n. (*o*).
(*p*) See stat. 45 & 46 Vict. c. 39, s. 7; Wms. Real Prop. 338 and n. (*c*), 23rd ed.
(*q*) 1 Dart, V. & P. 499, 5th ed.; 568, 6th ed.
(*r*) Stat. 3 & 4 Will. IV. c. 74.
(*s*) Stat. 42 & 43 Vict. c. 78; R. S. C. 1883, Order 61, r. 9.
(*t*) Established by stat. 1 & 2 Vict. c. 94.

1897 (*u*), as are open to public inspection, is to discover whether the title to the land sold has been or is about to be registered under those Acts. This may be ascertained at the Office of Land Registry by inspection of the general map and the index maps and search in the list of pending applications kept there. Such inspection and search should certainly be made on every sale of unregistered land situate in a district where registration of title is compulsory on sale (*v*); and, having regard to the effect of registration under these Acts in extinguishing title (*w*), it is no doubt a prudent precaution to take on any sale. But until voluntary registration of title becomes more common than it has hitherto been, the risk practically run in omitting this search, on the purchase of land not situate in a compulsory registration district, will not be great. If it should be found that the title to the land sold has been registered, the purchaser must of course take the steps requisite on a purchase of registered land to acquire a transfer of the estate to himself. The object and necessity of search in the Middlesex and Yorkshire Registries on the purchase of lands situate in those counties sufficiently appears from what has been said above concerning such sales (*x*). The Court Rolls should be searched on the sale of copyholds (*y*) for similar reasons.

Search in Middlesex and Yorkshire Registries.

Copyholds.

It appears, then, that the searches which should usually be made on the purchase of land are the following:—

What searches should usually be made.

1. In the Office of Land Registry for writs and orders affecting land registered or re-registered within the last five years (*z*). 1. Writs and orders affecting land.
2. In the same office for any *lis pendens* registered or re-registered within the last five years (*a*). And where the lands sold are situate in Lancashire or Durham, for *lis pendens* so registered or re-registered in the Lancaster or Durham Court of Chancery (*b*). 2. *Lis pendens*.
3. In the Office of Land Registry for registered life annuities (*c*). 3. Life annuities.

(*u*) Stats. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65; Land Transfer Rules (1898), 12, 14; Wms. Real Prop. 733, 734, 23rd ed.
(*v*) Above, p. 367.
(*w*) See Wms. Real Prop. 705-710, 23rd ed.
(*x*) Above, pp. 361 *sq.*
(*y*) Above, p. 335.
(*z*) Above, pp. 547-554.
(*a*) Above, pp. 559, 560.
(*b*) Above, p. 560.
(*c*) Above, p. 554.

4. Bankruptcy.

4. If there is reason to suspect that the vendor or some former owner is or has been in embarrassed circumstances, then certainly, but advisably on every sale, for adjudications of bankruptcy, receiving orders, schemes of arrangement, and compositions under the Bankruptcy Acts, 1883 and 1914 (*d*). These searches are made in the registers kept at the Bankruptcy Court in London (*e*). Receiving orders and adjudications are required to be advertised in the *London Gazette* (*f*).

5. Deeds of arrangement.

5. In the same circumstances, but advisably on every sale, at the Office of Land Registry, and also in the Bills of Sale Department of the Central Office (*g*), for deeds of arrangement registered there (*h*).

6. For registration of title.

6. On sale of land situate in a district where registration of title is compulsory on sale, but as a prudent precaution (though perhaps the caution is excessive) on every sale, at the Office of Land Registry in the general map, index maps, and list of pending applications (*i*).

7. Land charges.

7. On sale of land which is or has within the last twenty-five years been agricultural land (*k*), or may otherwise be subject to some land improvement charge (*l*), in the Office of Land Registry for land charges registered there (*m*).

8. Middlesex or Yorkshire Register.

8. On purchase of land situate in Middlesex or Yorkshire, in the county register for any registered assurance affecting the land (*n*).

9. Court Rolls.

9. On purchase of copyholds, in the Court Rolls, for any enrolled assurance affecting the land purchased (*o*).

(*d*) Above, pp. 560-562. At the present time it can hardly ever be necessary to search for adjudications or liquidations by arrangement under the Bankruptcy Act, 1869, or any previous Bankruptcy Act, or for insolvency; see Wms. Pers. Prop. 266, n. (*c*), 267, n. (*k*), 17th ed.

(*e*) Elphinstone and Clark on Searches, 98, 100, 101.

(*f*) Stat. 4 & 5 Geo. V. c. 59, ss. 11, 18 (2), 137, replacing 46 & 47 Vict. c. 52, ss. 13, 20 (2), 132.

(*g*) See above, p. 561 and n. (*g*).

(*h*) Above, p. 561.

(*i*) Above, p. 563.

(*k*) See above, pp. 165, 555-559.

(*l*) See above, pp. 555-559.

(*m*) Above, pp. 555, 556. It can hardly ever be necessary now to search for land charges created prior to the year 1889 and registered there or elsewhere, the terms for which land improvement rent-charges were then authorised to be created having expired; see above, pp. 555-557, and notes.

(*n*) Above, p. 563.

(*o*) Above, p. 563.

10. On the purchase of land from a company registered under the Companies Act, 1862 (*p*), or the Companies (Consolidation) Act, 1908, at the office of the Registrar of Joint Stock Companies in the register established there by the Companies Acts, 1900 (*q*) and 1907 (*r*) and the Companies (Consolidation) Act, 1908 (*s*), of the mortgages and charges created after the year 1900 by any such company for any of the purposes mentioned in those Acts. Where a *limited* company is the vendor the purchaser should also inspect the company's register of all mortgages and charges specifically affecting its property (*t*). And, as by the Companies (Consolidation) Act, 1908 (*u*), in the case of a winding up of a

10. On purchase of land from a company.

(*p*) Stat. 25 & 26 Vict. c. 89.
(*q*) Stat. 63 & 64 Vict. c. 48, s. 14.
(*r*) Stat. 7 Edw. VII. c. 50, s. 10.
(*s*) Stat. 8 Edw. VII. c. 69, s. 93, whereby every mortgage or charge created after the 1st of July, 1908, by a company registered in England or Ireland and being either (1) for the purpose of securing any issue of debentures, or (2) on uncalled capital of the company, or (3) created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale, or (4) on any land, wherever situate, or any interest therein, or (5) on any book debts of the company, or (6) a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless registered as therein required within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured. This section replaced stat. 7 Edw. VII. c. 50, s. 10, which by sect. 52 (3) came into operation on the 1st July, 1908, and replaced with amendments stat. 63 & 64 Vict. c. 48, s. 14, containing similar provisions but not extending to mortgages or charges made for purposes (4) and (5) above mentioned or saving the contract or obligation for repayment. See *Re Harrogate Estates, Ltd.*, 1903, 1 Ch. 498; *Cornbrook, &c. Co.* v. *Law Debenture Corpn.*, 1904, 1 Ch. 103; *Illingworth* v. *Houldsworth*, 1904, A. C. 355; *Re Yolland, &c., Ltd.*, 1908, 1 Ch. 152; *Bristol United Breweries, Ltd.* v. *Abbot*, ib. 279; *Re New London, &c. Co.*, ib. 621; *Cunard Steamship Co.* v. *Hopwood*, 1908, 2 Ch. 564; *Wilson* v. *Kelland*, 1910, 2 Ch. 306. A mortgage or charge is "created" at the date of the mortgage deed; *Esberger & Son, Ltd.* v. *Capital and Counties Bank*, 1913, 2 Ch. 366. An unregistered mortgage of land by a company is absolutely void as against a subsequent registered mortgage, though the subsequent mortgagee had notice of the prior mortgage; *Re Monolithic Building Co.*, 1915, 1 Ch. 643.
(*t*) See stat. 8 Edw. VII. c. 69, ss. 100, 101 (the latter replacing 7 Edw. VII. c. 50, s. 17), under which this register is open to public inspection. This register was established by stat. 25 & 26 Vict. c. 89, s. 43, but was thereby made open to the inspection of creditors and members of the company only. It was held that non-registration in this register did not avoid the charge; *Wright* v. *Horton*, 12 App. Cas. 371.
(*u*) Stat. 8 Edw. VII. c. 69, s. 205 (2), replacing 25 & 26 Vict. c. 89, s. 153.

company by or subject to the supervision of the Court, every disposition of the property of the company made after the commencement of the winding up (*x*) shall, unless the Court otherwise orders, be void, a purchaser of land from a company should, where there is any reason to suspect the position of the company, search in the *London Gazette* for advertisements of winding-up petitions (*y*).

This exhausts the list of searches, which ought usually to be made; but it will be observed that of these the first three only are unquestionably necessary on every sale; though Nos. 4 and 5 are very desirable and No. 6 is perhaps advisable apart from the special circumstances which make them absolutely requisite. Nos. 7, 8, 9, and 10 need only be undertaken on the purchase of the particular kind of property which can be affected by the registered incumbrances so to be searched for. Search for disentailing assurances or certificates of the acknowledgment of deeds by married women is only necessary in the special circumstances above mentioned (*z*).

Against what names searches should be made.

It was not the practice, prior to the Land Charges Acts of 1888 (*a*) and 1900 (*b*), to direct any search to be made in respect of any of the charges or matters then necessary to be searched for—viz. judgments, writs of execution, Crown debts and process of execution, annuities, *lis pendens*, and assurances registered in a county register or enrolled in Court Rolls (*c*)—against the names of persons entitled previously to the date of the last purchase deed, as it was assumed that all necessary searches were made on the occasion of the last purchase (*d*). And the

(*x*) This is, on a winding up by the Court, the time of the presentation of the petition for winding up; and on a winding up under the supervision of the Court, the time of the passing of the resolution authorising the winding up; see stat. 8 Edw. VII. c. 69, ss. 139, 183, replacing 25 & 26 Vict. c. 89, ss. 84, 130; *Weston's Case*, L. R. 4 Ch. 20; *Re Dry Docks Corpn.*, 39 Ch. D. 306; *Re West Cumberland Iron Co.*, 40 Ch. D. 361.

(*y*) 1 Dart, V. & P. 566, 6th ed.; 1222, 7th ed.

(*z*) Above, p. 562.

(*a*) Stat. 51 & 52 Vict. c. 51.

(*b*) Stat. 63 & 64 Vict. c. 26.

(*c*) See Wms. Real Prop. 86-94, 465-467, 13th ed.; 289-298, 307-310, 317, 318, 661-664, 23rd ed.

(*d*) On this point the testimony of Mr. Joshua Williams is express: Wms. Real Prop. 357, 1st ed.; 465, 13th ed. And the same rule is laid down in Elphinstone & Clark on Searches, 144, 148, 149. Mr. Dart,

same practice prevails with respect to the matters above mentioned (*e*) as to which searches are now required; though in strictness it appears desirable to carry back searches Nos. 1 and 2 in every case for the whole five years before the sale and to extend searches Nos. 8 (*f*) and 9 over the whole period covered by the abstract. But search should always be made against the names of all persons appearing by the abstract to have been entitled to the land sold since the date of the last purchase deed for any estate or interest which might be adversely affected by any of the incumbrances to be discovered by the search. Thus the search for writs and orders affecting land and *lis pendens* should be made against the names of trustees or mortgagees as well as beneficial owners; for a writ, order, or suit affecting the land sold may well have been issued, made, or instituted against a trustee or mortgagee, although the judgment or Crown debts of a trustee (*g*) or of a mortgagee, who has been paid off (*h*), cannot affect the trust or mortgaged property. The same search should also be made against the names of persons entitled to a general power of appointment over the land sold or to any vested or contingent remainder or any executory interest therein, if the title depend on any exercise or release of the power or any release or conveyance of the remainder or executory interest. For under the Judgments Act, 1838, and the Land Charges Act, 1900, lands over which a man has a general power of appointment may be taken under the writ of

however, stated that searches in the Middlesex and Yorkshire Registries and in the Court Rolls should extend over the whole period covered by the abstract: 1 Dart, V. & P. 497, 5th ed.; 567, 6th ed.; 1223, 7th ed. The statement in 1 Dart, V. & P. 560, 6th ed., that it is not the practice to go further back, in searching, than the last *mortgagee* or purchaser for value does not appear in the 5th ed. (p. 491), and is the statement of the editors only. The same statement as to the practice is, however, made in Wolstenholme's Conveyancing and Settled Land Acts, 196, 8th ed.

(*e*) Above, pp. 563-566.

(*f*) Since the abolition of the protection of the legal estate and the doctrine of tacking by the Yorkshire Registries Act, 1884 (above, p. 456), it has been of supreme importance to make a careful and exhaustive search in the Yorkshire Registries on every dealing with land there situate. The dire results of neglecting so to search are shown in *Manks* v. *Whiteley*, 1911, 2 Ch. 448, reversed, 1912, 1 Ch. 735, restored on different grounds, nom. *Whiteley* v. *Delaney*, 1914, A. C. 132. All the litigation in that case would have been avoided if proper searches had been made. **Search in Yorkshire Registry.**

(*g*) *Finch* v. *Winchilsea*, 1 P. W. 277, 282; *Whitworth* v. *Gaugain*, 1 Ph. 728.

(*h*) Stat. 18 & 19 Vict. c. 15, s. 11; *Greaves* v. *Wilson*, 25 Beav. 434; Wms. Real Prop. 627, 628, 23rd ed.

elegit in execution of a judgment against him, and the judgment is a charge on the lands when the writ or order for enforcing it has been registered (*i*). Under the same Acts (*i*), too, a judgment is a charge on all lands to which the judgment debtor is entitled for any estate or interest at law or in equity, whether in possession, reversion, remainder, or expectancy, so soon as a writ or order for enforcing the same has been registered (*k*). And, although no legal estate of freehold in reversion or remainder, not being merely expectant on a lease for years (*l*), can actually be delivered in execution under a writ of *elegit* (*m*) or an order for the appointment of a receiver (*n*), it appears that under the present law, if a judgment creditor obtain a writ of *elegit*, or even an order appointing a receiver, for enforcing the judgment, and duly register the writ or order, he will at once obtain the statutory charge on the debtor's estates in reversion or remainder, whether legal or equitable (*o*). Life annuities are generally searched for against the names of beneficial owners only: though a trustee might also create such charges valid at law, where the trust is not disclosed by the title deeds. It is not generally necessary to search in bankruptcy against the names of trustees who have no beneficial interest, as their estates are not affected thereby (*p*): but it must not be forgotten that where a trustee has a lien on the trust property for his own benefit—as to secure his right of indemnity against liabilities incumbent on him as such trustee (such as a trustee of leaseholds has against the rent and cove-

(*i*) Stats. 1 & 2 Vict. c. 110, ss. 11, 13; 63 & 64 Vict. c. 26, s. 2 (1); above, pp. 550, 551; Wms. Real Prop. 415, 23rd ed.

(*k*) See above, p. 550; Wms. Real Prop. 456, 457, 23rd ed.

(*l*) *Mayor of Poole* v. *Whitt*, 15 M. & W. 571.

(*m*) *Re South*, L. R. 9 Ch. 369; *Hood-Barrs* v. *Cathcart* (*No.* 5), 1895, 2 Ch. 411.

(*n*) *Re Harrison and Bottomley*, 1899, 1 Ch. 465; Cozens-Hardy, M. R., *Ashburton* v. *Nocton*, 1915, 1 Ch. 274, 281, 282.

(*o*) See *Ashburton* v. *Nocton*, 1915, 1 Ch. 274, 282-290; above, pp. 550, 551. It is a question whether equitable execution by an order for the appointment of a receiver can effectively be issued against a judgment debtor's equitable estates in reversion or remainder, not being merely expectant on a lease for years. The jurisdiction of the Court to make an order for the appointment of a receiver in respect of a judgment debtor's equitable estates in reversion or remainder in land may be supported by the decision in *Tyrrell* v. *Painton*, 1895, 1 Q. B. 202: but the principles laid down in *Holmes* v. *Millage*, 1893, 1 Q. B. 551, *Re Badger*, 1913, 1 Ch. 385, 390, and *Morgan* v. *Hart*, 1914, 2 K. B. 183, are opposed to any such jurisdiction.

(*p*) Stat. 4 & 5 Geo. V. c. 59, ss. 18, 38, 167, replacing 46 & 47 Vict. c. 52, ss. 20, 44, 168.

nants of the lease)—and the retention of the property is necessary to give effect to his lien, his legal estate or interest in the property, and his right to hold the same, until satisfaction of his lien, will vest, in the event of his bankruptcy, in the creditors' trustee (*q*). And mortgagees' estates are divested on their bankruptcy. Land charges registered under the Land Charges Act, 1888 (*r*), are entered, in the case of freeholds, in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge, and in the case of copyholds, in the name of the tenant on the Court Rolls at the time of the creation of the charge; and they must be searched for against such names. Land improvement charges created before the year 1889 must be searched for (if necessary) against the name of the landowner at whose instance they were made (*s*); generally the person beneficially entitled in possession to the rents and profits of the land.

No obligation on purchaser to search.

It may be observed that there is no obligation on a purchaser to make or direct any search at all; he owes no duty in this respect to any person interested under an entry in any register, and omission to search is not negligence which will affect him with notice of any matter to be discovered by searching (*t*).

Search is notice.

But if he do make a search in person or by agent, he will be affected with notice of all entries in the register which affect the land sold, although he may fail to discover them (*u*).

Duty of purchaser's solicitor to search.

It is the duty of the purchaser's solicitor to make on his behalf all searches which in the circumstances of the case are necessary and proper (*x*); and if he omit so to search and the purchaser's

(*q*) *Jennings* v. *Mather*, 1901, 1 Q. B. 108; *Governors of St. Thomas's Hospital* v. *Richardson*, 1910, 1 K. B. 271.

(*r*) Stat. 51 & 52 Vict. c. 51, s. 10, providing also that where the person, on whose application the land charge was created, was beneficially entitled to a lease for lives or life at a rent or to a term of years, the land charge shall also be registered in the name of that person.

(*s*) See the Acts cited above, pp. 555-559; Elphinstone & Clark on Searches, 109 *sq.*; above, p. 564, n. (*m*).

(*t*) *Lane* v. *Jackson*, 20 Beav. 535; *Manks* v. *Whiteley*, 1911, 2 Ch. 448, 457, as to search in the Yorkshire Registry; reversed (but not on this point), 1912, 1 Ch. 735, 757, 758; restored, nom. *Whiteley* v. *Delaney*, 1914, A. C. 132.

(*u*) *Procter* v. *Cooper*, 2 Drew. 1, 18 Jur. 444; affirmed, 1 Jur. N. S. 149. Having regard to the provisions of stat. 45 & 46 Vict. c. 39, s. 2 (3), stated below, as to the certificate of the result of an official search being conclusive, negatively, it seems that a purchaser will not, by merely directing an official search to be made, be affected with notice of any entries not appearing in the certificate.

(*x*) See above, pp. 563-566.

title be injuriously affected in consequence, he will be liable to his client in an action of negligence for the damage incurred (*y*).

Official searches.

Under the Conveyancing Act, 1882 (*z*), and the Land Charges Act of 1888 (*a*), official searches may be directed to be made in the registers of *lis pendens*, life annuities, writs and orders affecting land, land charges, deeds of arrangement, and certificates of acknowledgment by married women, and a certificate of the result of the search filed. Such a certificate, according to the tenour thereof, is conclusive, affirmatively or negatively, as the case may be, in favour of a purchaser as against persons interested under the matters or documents, which are the subject of registration; an office copy is evidence of the certificate; and solicitors obtaining an office copy of such a certificate, and any trustees, executors, agents or other persons in a fiduciary position for whom they are so acting, are not answerable in respect of any loss that may arise from any error in the certificate (*b*). These advantages are not obtainable on private searches, which may still be made. The utility of official searches has, however, been doubted by the learned authors of the treatise on searches (*c*), who maintain that the certificate of the result of an official search can only be evidence, negatively, that no entry of any of the matters searched for is made against the name of the person therein mentioned by the description applied to him in the requisition for search, and does not exclude the possibility of the existence of other entries against that person by the same name but under a different address or description. It appears, however, that this contention is not quite correct. The Conveyancing Act, 1882, provides that the certificate shall be conclusive according to *its* tenour, not according to the tenour of the requisition for search. It is true that by the rules made under that Act (*e*) any one directing an official search to be made against a particular name is required to state the usual or last known

(*y*) *Cooper* v. *Stephenson*, 16 Jur. 424, 21 L. J. Q. B. 292; Sug. V. & P. 547; Elphinstone & Clark on Searches, 4, 5; Dart, V. & P. 454 455, 5th ed.; 522, 523, 6th ed.; 1196, 1197, 7th ed.

(*z*) Stat. 45 & 46 Vict. c. 39, s. 2.

(*a*) Stat. 51 & 52 Vict. c. 51, s. 17.

(*b*) See the two previous notes.

(*c*) Elphinstone & Clark on Searches, 166-168.

(*e*) See Wms. Conv. Stat. 479 *sq.*; Wolstenholme's Conveyancing and Settled Land Acts, 174 *sq.*, 10th ed.

place of abode as well as the title, trade or profession of the person bearing that name. But according to the forms prescribed by these rules, the search is directed to be made against the *name* mentioned in the requisition, and the certificate is of the result of a search against the name specified in the certificate. By the practice of the office, too, the certificate of the result of the search does not necessarily specify the address and description of the person against whose name the search was made. If no entry, or none but those specified in the certificate, were found against any person of that *name*, the fact is so stated in the certificate, without adding the address and description contained in the requisition for search; and in such case the certificate certainly has a value unobtainable by a private search. If entries are found against the same name but coupled with a different address and description, the certificate then states that no entries, or none but the entries specified therein, have been found against the name, address and description contained in the requisition for search. This form of certificate shows that there are entries against the same name but coupled with an entirely different address and description, and is a warning that further search may be necessary. If, however, entries are found against the name specified in the requisition for search, but coupled with an address and description which, though not identical with those contained in the requisition, render it probable that the person so described is the same as that mentioned in the requisition, then a note is made in the schedule to the certificate, of the entries against the person so described. And if the identity of the person be certain, as it would be in the case of a peer, though the address be different, all the entries against the name are included in the schedule to the certificate (*f*). It appears, therefore, that a certificate of the result of an official search has a greater value than is allowed by the learned authors of the treatise on searches; and it seems that in general the best course to take is to direct an official, instead of making a private search. When this course is adopted, the purchaser obtains in the certificate a valuable document of title, and the purchaser's solicitor is relieved from the liability which he would incur if he or one of his clerks searched the register but failed to discover a material entry.

(*f*) The author is indebted for this information to the courtesy of the officials in the Land Charges Department of the Office of Land Registry.

Official searches for disentailing deeds and in the Yorkshire and Middlesex Registries.

Official searches may also be directed to be made in the index of enrolled disentailing deeds (*g*), in the Yorkshire Registries (*h*), and in the index of assurances registered in the Middlesex Registry (*i*). The certificate of the result of any such search has no effect as against any person interested under any entry duly made, but not disclosed by the certificate (*k*); but in the case of the Middlesex (*i*) and Yorkshire (*h*) Registries, solicitors directing an official search, and any persons in a fiduciary position for whom they are acting, are protected against liability for any loss that may arise in consequence of an error in the certificate. It appears, therefore, that in these cases also, the best course for the purchaser's solicitor to take is to direct an official search. It may be remarked that an official search must necessarily be made by a person familiar with the register or index of which he is in charge, and experienced in searching for entries therein; but a solicitor may not always be able to entrust a private search to a clerk experienced in such matters.

Inquiries to be made before completion.

Besides making the above-mentioned searches (*l*), the purchaser should, where the property sold is likely to be subject to any statutory charge of the kind held *not* to be a land charge within the meaning of the Land Charges Act of 1888 (*m*), such as a charge for a proportion of the expenses incurred by a local authority in sewering, paving or lighting an adjoining street, inquire of the vendor whether the property is or will become subject to any such charge, and also if he has notice or knowledge of any fact (such as a demand made, notice served, or resolution passed by the local authority requiring the execution of any street or other works) which will subject the property sold to a charge of this kind at some future time. This inquiry is usually appended to the requisitions on title (*n*): but as such a liability may arise after they have been delivered, and should be discharged by the vendor as an outgoing if

(*g*) R. S. C. 1883, Order 61, r. 23.
(*h*) Stat. 47 & 48 Vict. c. 54, ss. 20-23, 31.
(*i*) Land Registry (Middlesex Deeds) Rules, 1892, Nos. 9-14 (W. N. 13th Feb. 1892), amended as to rules 10 and 11 by Rules of 1913 (W. N. 22nd March, 1913).
(*k*) See stat. 45 & 46 Vict. c. 39, s. 2 (1, 11); Wms. Conv. Stat. 273, 274.
(*l*) Above, pp. 563-566.
(*m*) Above, pp. 165, 497, 558, 559.
(*n*) Above, p. 165.

incurred before the time fixed for completion (*o*), it is prudent, where there is a likelihood or possibility of any such liability, to repeat this inquiry just before completion, and also to make inquiry of others, as of neighbours or of the local authority (*p*). As we have seen (*q*), a purchaser may be able to insist on such a liability being discharged as a condition precedent to completion in cases where he might have some difficulty in recovering the amount thereof from the vendor if paid by himself after completion. In such cases he should beware of agreeing to complete the purchase, subject to the determination by the Court of the question of his liability, for in that way he may deprive himself of his only possible remedy (*r*). And generally the purchaser should ascertain, before he completes the purchase, that all outgoings payable by the vendor, whether for rates, taxes, rent or any other matters that might subject the purchaser to any liability for their payment (*s*), have been duly discharged. If the property sold include a house having water, gas or electric light laid on, the purchaser should ascertain that the water rate or other charges payable by the vendor have been duly paid or that non-payment thereof will not subject him to any liability (*t*).

As to discharge of outgoings payable by the vendor.

(*o*) Above, pp. 496-498.

(*p*) See *Re Leyland and Taylor's Contract*, 1900, 2 Ch. 625, where a purchaser, who had completed his contract under an agreement to do so without prejudice to the question of his right to compensation, was held not to be entitled to compensation, under a condition providing that compensation should be allowed for any omission in the particulars, by reason of the vendor having omitted, without fraudulent intent, to disclose that such a notice as above mentioned had been served on him before the date of the contract for sale, no liability under such notice having been actually incurred before completion. It was pointed out, however, by Rigby, L. J. (p. 632), that, if the purchaser had not completed the contract, he might perhaps have relied upon such omission as a ground for resisting the specific performance or claiming the rescission of the contract. The same law was applied and laid down in *Re Derby and Fergusson's Contract*, 1912, 1 Ch. 479, 481, 488. Cf. *Carlish* v. *Salt*, 1906, 1 Ch. 335, 340, where the objection was successfully taken before completion, and the contract was rescinded; but see the writer's criticism of the *dicta* in this case in 50 Sol. J. 611; and as to non-disclosure, see below, Chap. XIII. § 1, XIV. § 1. See also *Hampstead Corpn.* v. *Caunt*, 1903, 2 K. B. 1, as to the liabilities of the above nature which a purchaser may incur. It has been laid down that in cases of the above kind there is no incumbrance nor even a liability, inchoate or otherwise, on the property, until the charge given by the statute has arisen: *Re Allen and Driscoll's Contract*, 1904, 2 Ch. 226, 230, 231; see above, pp. 166, 167, 497, and n. (*o*).

(*q*) Above, pp. 166, 167, 497, 498.

(*r*) See above, note (*p*), and p. 167.

(*s*) Above, p. 497.

(*t*) See *Sheffield Waterworks Co.* v. *Wilkinson*, 4 C. P. D. 410, 422,

Ascertaining that possession is in accordance with the title.

Inquiry of tenants and occupiers as to their interest.

The purchaser must further ascertain that the possession or enjoyment of the land sold is in accordance with the title shown. For this purpose he should ask if the property sold is let or in hand, and who is in occupation of the land in hand and in receipt of the rents and profits of the land let (*u*); and he should make inquiries of all tenants or occupiers of the property sold or any part thereof as to the nature and extent of their interest therein. For if he have notice of a tenancy of any part of the property, he will be affected with notice of all rights or equities of the tenant against the vendor with regard not only to the lease (*v*), but also to all collateral matters (*x*); as, for instance, if the tenant should have an agreement or option to purchase the demised premises (*y*), or the timber growing thereon (*z*), or if the property sold belonged in equity to a partnership firm, of which the vendor was a member (*a*), and were in the occupation of the firm (*b*). So, actual knowledge that the rents are paid to some person, whose title is inconsistent with the vendor's, is constructive notice of that person's rights: but mere knowledge that the rents are paid to an estate agent does not affect the purchaser with any notice or put him upon inquiry (*c*). As we have seen (*d*), where the property sold is a reversion expectant on a leasehold interest yielding rent, the purchaser should ascertain that the tenant is paying his rent to the vendor. And where land is sold with vacant possession to be given on completion of the purchase, the purchaser should ascertain that the vendor himself, or some person who makes no claim adverse to the vendor's title and will undertake to give up possession according to the contract of sale, is in occupation thereof (*e*). As has

424; *East London Waterworks Co.* v. *Kellerman*, 1892, 2 Q. B. 72; *Cannon Brewery Co.* v. *Gas Light and Coke Co.*, 1904, A. C. 331.

(*u*) Above, p. 167; below, Appendix (C).

(*v*) See *Caballero* v. *Henty*, L. R. 9 Ch. 447, 449; and as to notice of the tenant's claims for compensation in the case of an agricultural holding, *Re Derby and Fergusson's Contract*, 1912, 1 Ch. 479, 487, 488; above, pp. 163, 164; and see above, p. 153, n. (*y*), as to notice of a tenancy where the land is sold with possession.

(*x*) *Barnhart* v. *Greenshields*, 9 Moore, P. C. 18, 32; *Hunt* v. *Luck*, 1901, 1 Ch. 45, 49; 1902, 1 Ch. 428, 432.

(*y*) *Daniels* v. *Davidson*, 16 Ves. 249, 17 Ves. 433.

(*z*) *Allen* v. *Anthony*, 1 Mer. 282.

(*a*) See above, p. 443.

(*b*) *Cavander* v. *Bulteel*, L. R. 9 Ch. 79.

(*c*) *Hunt* v. *Luck*, 1901, 1 Ch. 45; 1902, 1 Ch. 428.

(*d*) Above, p. 382.

(*e*) As to the duty of the vendor to give up vacant possession on

been already mentioned (*f*), it is possible that a person may be in possession of the property sold by virtue of a writ of *elegit* actually executed but not registered, or that a tenant may be paying his rent to a receiver appointed under an unregistered order made by way of equitable execution; and in such cases the purchaser may be bound by the writ or order if he have notice of it. The purchaser should also carefully inspect the whole of the property sold and have it surveyed prior to completion, and should make inquiry of the tenants or occupiers with respect to the boundaries or other matters regarding the physical condition of the property. For if by reason of any material defect of quantity or otherwise the property sold do not correspond with the description of it given in the contract, or in any representation which induced the purchaser to make the contract, and the error be caused by the innocent misrepresentation of the vendor and not by fraud, the purchaser will be entitled to resist the specific performance of or to rescind the contract, while it remains uncompleted (*g*): but when the contract has been fully performed, the purchaser will not be entitled to any relief in respect thereof (*h*), except (1) by virtue of an express agreement contained in the contract to make compensation for such errors (*i*), or (2) if the defect be really a defect of title and compensation be recoverable under the covenants for title contained in the conveyance (*k*), or (3) if the representation amounted to a warranty, collateral to the contract for sale, of the truth of the fact stated (*l*).

Inspection and survey of the property.

Here it may be mentioned that if a man buy land without inspecting it, he does so at his own risk and must accept without compensation any defects in the physical condition of the pro-

Purchaser buying without inspection must accept

completion, see above, pp. 153 and n. (*y*), 488, 491, 545; *Engell* v. *Fitch*, L. R. 4 Q. B. 659; *Royal Bristol, &c. Society* v. *Bomash*, 35 Ch. D. 390.

(*f*) Above, p. 552.

(*g*) Above, p. 573, and n. (*p*); *Jacobs* v. *Revell*, 1900, 2 Ch. 858; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.

(*h*) *Wilde* v. *Gibson*, 1 H. L. C. 605, 632, 633; *Joliffe* v. *Baker*, 11 Q. B. D. 255; *Clayton* v. *Leech*, 41 Ch. D. 103; *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326; above, pp. 60, 573, n. (*p*); below, Chap. XIV. § 1.

(*i*) *Palmer* v. *Johnson*, 13 Q. B. D. 351; above, pp. 60, 61; see *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98; below, § 4 of this Chapter.

(*k*) *May* v. *Platt*, 1900, 1 Ch. 616; *Eastwood* v. *Ashton*, 1913, 2 Ch. 39, reversed on the construction of the conveyance, 1914, 1 Ch. 68, restored, 1915, A. C. 900; and see *Debenham* v. *Sawbridge*, ubi sup.; below, Chap. XIX. § 5.

(*l*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215.

patent, but not latent defects.

perty which are patent to any one who views it and are not inconsistent with the description contained in the contract for sale; as where a meadow sold is crossed by what is obviously a public footpath (*m*), or a house sold is plainly out of repair (*n*). But a man may decline to perform the contract on account of defects which are latent, or not discoverable by inspection, if they interfere materially with the enjoyment promised to him by the contract; as where a pathway across a field adjoining a private dwelling-house is subject to an easement of way, not disclosed by the contract, in favour of an adjoining landowner (*o*), or the land sold is crossed by an underground culvert (*p*) or a public underground sewer (*q*), or by a public footpath not obviously apparent to be such (*qq*); and this is the case whether the purchaser actually inspect the property sold or not, and notwithstanding that the contract provide that, the property being open to inspection, the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof (*r*). Such a stipulation may, however, in some cases prevent the purchaser from raising objections to defects discoverable by a careful survey, though not by a mere casual view of the property (*s*). As we have seen (*t*), if a man buy land with notice that a good title cannot or will not be made in some particular, he is precluded from objecting in this respect to the title shown, unless the vendor have by the contract of sale expressly agreed to make a good title. This doctrine may prevent a purchaser buying land with notice of physical defects, which would otherwise constitute a ground for refusing to perform the contract, from objecting to the title on that account; and may also preclude him from avoiding the contract, where the vendor has made an innocent misrepresentation as to the property sold, but the purchaser bought with notice of the true state of the facts (*u*).

(*m*) *Bowles* v. *Round*, 5 Ves. 508.
(*n*) *Grant* v. *Munt*, G. Coop. 173, 177; *Keates* v. *Cadogan*, 10 C. B. 591; *Cook* v. *Waugh*, 2 Giff. 201.
(*o*) *Ashburner* v. *Sewell*, 1891, 3 Ch. 405; see above, pp. 66, n. (*b*), 163, 167, 573, and n. (*p*).
(*p*) *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.
(*q*) *McGrory* v. *Alderdale Estate Co.*, 1918, A. C. 503, 507, 510, 512.
(*qq*) *Yandle* v. *Sutton*, 1922, 2 Ch. 199.
(*r*) *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.
(*s*) *Re Terry and White's Contract*, 32 Ch. D. 14, 23.
(*t*) Above, pp. 188, 343, 344.
(*u*) See *Farebrother* v. *Gibson*, 1 De G. & J. 602; *Leyland* v. *Illingworth*, 2 De G., F. & J. 248; below, Chap. XIV. § 1.

§ 3.—*Of the Preparation of the Conveyance.*

Preparation of the conveyance.

As we have seen (*v*), it is the purchaser's duty at his own expense to prepare a proper instrument of conveyance to himself of the property sold and to tender the same to the vendor for his execution; the vendor is bound to execute this instrument at his own expense; and where other persons than himself are necessary parties thereto in order to convey to the purchaser the whole estate contracted for, he is bound, in the absence of stipulation to the contrary, to procure them to execute the same at his own expense. What persons are necessary parties to the conveyance will have been ascertained on the investigation of title. Every person in whom is vested any portion of the legal and equitable estate contracted for in the land sold, or any interest therein, must concur in the conveyance to the purchaser, unless his interest be such that it will be conveyed or defeated by the execution of some paramount trust or power intended to be exercised by the instrument of conveyance. Thus, where an unincumbered estate in fee simple is sold, all persons entitled for a vested estate either for life, in tail, or in fee, and either in possession or in remainder, to the whole or any fraction of the freehold in fee, all persons entitled to any contingent or executory interest which will or may displace or defeat any present vested estate, all mortgagees, portioners, jointresses and doweresses, all persons entitled to any term of years, continuing tenancy, rent-charge, *profit à prendre* or easement, and all persons interested in the property sold under any trust or equity of or by which the purchaser has notice or is bound (*x*), are necessary parties to the conveyance (*y*); unless the assurance to the purchaser is to be effected, for example, by the exercise of a power of appointment operating under the Statute of Uses or created by will, of a statutory power, such as that given by the Settled Land Act, 1882 (*z*), or of a trust for or power of sale on the part of trustees having the legal estate (*a*). Where a trust for or power of sale is exercisable only with the consent of some person, such consent must of course be obtained; and the practice is that such person should

Who are necessary parties to the conveyance.

Trust for or power of sale with consent of some person.

(*v*) Above, pp. 34, 43, 61, 67, n. (*c*), 545.
(*x*) Above, pp. 158, 224 *sq.*
(*y*) See Wms. Real Prop. 452, 453 and elsewhere, 13th ed.; 653, 654, and elsewhere, 23rd ed.
(*z*) Above, p. 287.
(*a*) Above, p. 241.

testify his consent by being made a party to and executing the deed of conveyance (*b*). Where the conveyance is to be carried out by virtue of an authority paramount to the estate or interest of some person entitled, who is not, therefore, to be made a party thereto, care must be taken that all persons, whose estates or interests are not bound by the execution of the authority, shall concur to convey the same. Thus we have seen that on a sale under the powers given by the Settled Land Acts, there may be various estates and interests, which will not be displaced or defeated by the conveyance of the tenant for life (*c*); and the owners of all such estates and interests, such as paramount mortgagees of the fee, mortgagees for securing money actually raised under some power or trust for the purpose contained in the settlement, or assignees for value of the estate of the tenant for life (unless these last by some separate document consent to the exercise of the tenant for life's power (*d*)), must be required to assure by their own conveyance their estates or interests to the purchaser. So also, where the purchaser has bought at a sale made by order of a Court of Equity, he need not require the concurrence in the conveyance of any persons having *equitable* estates or interests, which are bound by the order for sale: but he must obtain a conveyance of the interests of all persons entitled to the *legal* estate in the property, or to any equitable estate or interest therein *not* bound by the order (*e*). Where the title to any land sold is such that intermediate trustees are interposed between trustees seised or possessed of the legal estate and the persons beneficially entitled, as where land has been assured to the use of A. in fee on trust for B., who is a trustee for C., the intermediate trustees are not necessary parties to the conveyance of the land, which may well be made by the trustees holding the legal estate and

Sale under the Settled Land Acts.

Sale by order of the Court.

Intermediate trustees.

(*b*) Davidson, Prec. Conv. vol. ii. pt. 1, pp. 254, 258, 285, 289, 371, 372, 4th ed.; Davidson's Concise Precedents, 157, 159, 168-172, 19th ed.; 1 Key & Elph. Prec. Conv. 622, 628, 633, 10th ed. It is thought that, where a trust for or power of sale and conveyance is expressed to be exercisable by trustees with the consent of some other person, that person ought to concur in the instrument executing the trust or exercising the power: but that, if the consent *in writing* only of that person be required, such consent may well be evidenced by some separate writing. It is submitted that the decision in *Re Pope*, 1911, 2 Ch. 442, 447, governs only the particular case in which it was given; see above, p. 266.

(*c*) Above, pp. 288, 298 *sq.*

(*d*) See above, pp. 288, 298-305.

(*e*) Above, pp. 449, 450.

the persons beneficially entitled (*f*). The intermediate trustees, however, may possibly have acquired a lien on the land for their costs or expenses, so that their concurrence may, it seems, be required by a purchaser in order to release or acknowledge the non-existence of any such lien (*g*). And if it be proposed in such cases to dispense with their concurrence, inquiry should be made of them if they claim any such lien. Here we may notice that if any necessary party to the conveyance be under any incapacity, such as that of infancy, coverture on the part of a woman, or lunacy, all due steps must be taken to secure the proper assurance of his or her estate to the purchaser, either by vesting order (*h*), concurrence of the husband and acknowledgment of the deed in the case of a married woman not entitled to the land as her separate property, or otherwise.

Incapacity of any party to the conveyance.

On the side of the grantee or grantees under the conveyance, the purchaser himself is in general the only necessary party. But as we have seen (*i*), the vendor's obligation is to execute a conveyance of the land sold to the purchaser, or as he shall direct. The purchaser is therefore entitled to require the conveyance to be made to some other person or persons than himself, or to himself and others, and for such estates and interests as he shall direct; and the vendor is bound to assure the lands sold accordingly. It appears that in such case the vendor may in general demand that the purchaser, with whom alone he has contracted, shall be made a party to the conveyance in order to testify that he has directed the conveyance to be made to a stranger to the contract and that the vendor has duly performed his part of the contract by complying with this direction (*j*). But if the purchaser should have made an absolute assignment of all his interest in the contract, and the assignee have given notice of the assignment and be willing to take upon himself

Parties to the conveyance on the grantee's side.

Conveyance to the purchaser's nominee—

To his assignee of all his interest under the contract.

(*f*) See *Head* v. *Teynham*, 1 Cox, 57; —— v. *Walford*, 4 Russ. 372; *Grainge* v. *Wilberforce*, 5 Times L. R. 436. That the equitable interest of intermediate trustees is such as does not require to be expressly conveyed appears also to be the ground of the decision in *Dodson* v. *Powell*, 18 L. J. N. S. Ch. 237.

(*g*) See above, p. 354, and n. (*s*).

(*h*) Above, pp. 510, 531.

(*i*) Above, p. 43.

(*j*) This appears to follow from the fact that, if the purchaser's assignee seek to enforce the specific performance of the contract by the vendor, the purchaser should be made a party to the action (above, p. 537), and would be a proper party to a conveyance ordered in such action.

the whole burden of the original contract and prove his title by assignment from the purchaser, then it seems that the vendor ought to complete the contract with the assignee alone, without requiring any further concurrence of the purchaser (*k*). In this event, however, it is thought that the assignee could not insist on the vendor executing a conveyance which took no notice of the original contract and the assignment; for the vendor would be entitled to have the payment and receipt of the original price mentioned, and could not be made to accept any recital or statement alleging, contrary to the truth, that he had contracted with the assignee for the sale of the land (*l*).

Re-sale by purchaser before completion.

If the purchaser before completion re-sell the land to another, it is to the sub-purchaser's interest to obtain a conveyance direct from the vendor and taking no notice of the original contract, as this will prevent the raising in the future of any question whether the original purchaser incumbered his interest before the re-sale and the sub-purchaser had notice thereof (*m*). Where there is no increase of price on the re-sale, the vendor may well agree to this if the original purchaser sign a memorandum authorising him to convey the land direct to and to receive payment of the price from the sub-purchaser (*n*). But

(*k*) Above, pp. 537-539.

(*l*) *Hartley* v. *Burton*, L. R. 3 Ch. 365.

(*m*) It is thought that, where a purchaser re-selling before completion discloses to the sub-purchaser the fact that he is himself a purchaser under an uncompleted contract of sale and in effect sells the interest so acquired by him, the sub-purchaser cannot oblige him to take a conveyance from the original vendor; as that course would apparently involve the payment by the first purchaser of *ad valorem* stamp duty on such conveyance. But if the first purchaser so re-sell as if he were the full owner of the land, without disclosing that he is only entitled under an uncompleted contract of sale, it is submitted that the sub-purchaser's strict right would be to require the first purchaser to take a conveyance of the legal estate from the vendor in order to avoid all question of the first purchaser having incumbered his equitable interest under the contract for sale; see below, p. 583, and n. (*a*). Having regard to this liability, it is advisable for a purchaser of land re-selling before completion to sell his interest under the contract for sale, as such, and to stipulate expressly that the sub-contract shall be completed by a conveyance from the original vendor to the sub-purchaser by the first purchaser's direction. Where a purchaser of land re-sells before completion, he is bound to furnish, at the sub-purchaser's request, an abstract of the original contract for sale and of his dealings, if any, with his interest thereunder; *Re Hucklesby and Atkinson's Contract*, 102 L. T. 214, where note that the sub-purchaser expressly waived all objection to accepting a conveyance direct from the original vendor (see ibid. p. 215).

(*n*) See 1 Dart, V. & P. 511, 5th ed.; 581, 6th ed.; 536, 7th ed. The memorandum should be in duplicate, one part being given to the sub-purchaser.

Re-sale at an increased price.

if the purchaser re-sell at an increased price, he must be a party to the conveyance in order to acknowledge the receipt of his profit on the transaction (*o*); for the sub-purchaser is only entitled to a conveyance on payment of the price fixed by the re-sale to the person entitled to receive it (*p*), and cannot of course require the vendor to accept the whole of this and pay over part of it to the original purchaser. And the price fixed by the re-sale must be stated in the conveyance, as it is on that price that the stamp duty is payable (*q*). Where the vendor will remain after the conveyance under some liability in connexion with the property sold, as where leasehold land subject to payment of a rent and performance of onerous covenants is sold, and the purchaser is therefore bound to enter into a covenant of indemnity (*r*), it is thought that the vendor is not obliged to accept the liability of the purchaser's assignee as a substitute, but may insist on having the covenant of the person, with whom alone he himself has contracted (*s*).

Form of the conveyance.

Subject to the question discussed below (*t*), whether outstanding estates or incumbrances should be got in by deeds separate from the conveyance, the conveyance of the property sold will, as a rule, be effected by one deed. But it is for the purchaser to decide in what form he will take his conveyance, provided that the burden laid on the vendor, in respect of expense and otherwise, be not materially increased by the purchaser's choice (*u*). Thus, where properties of different kinds or held under different titles are sold by one contract, the purchaser may require the same to be conveyed by separate assurances and apportion the purchase money as he may think fit (*v*). For example, where freeholds and copyholds are sold together, the conveyance cannot of course be effected by one deed, the copyholds requiring to be assured by surrender and

(*o*) See Davidson, Prec. Conv. vol. ii. pt. i. 319, 4th ed.
(*p*) Above, p. 546.
(*q*) Stat. 54 & 55 Vict. c. 39, s. 58 (4), (5).
(*r*) See above, p. 75; and see below in the present section of this chapter as to the cases in which the purchaser is bound to give a covenant of indemnity.
(*s*) This appears clearly to follow from the rule that the burden of a contract cannot be assigned over; above, p. 538.
(*t*) Page 582.
(*u*) See *Clark* v. *May*, 16 Beav. 273; *Cooper* v. *Cartwright*, John. 679, 685; *Egmont* v. *Smith*, 6 Ch. D. 469, 474.
(*v*) *Clark* v. *May*, 16 Beav. 273.

admittance. So where freeholds and leaseholds are included in one contract of sale, the purchaser may require that his title to the freeholds shall not be incumbered with the assignment of the leaseholds, and as to the leaseholds themselves, that his title under one lease shall not be complicated with the assurance of land held under another. And where lands sold together lie far apart, as in different counties not adjoining each other, he may demand that they shall be assured by separate deeds. But it is questionable whether the vendor can be compelled, in the absence of special stipulation, to execute a great number of separate conveyances in different parcels of a block of land lying near together and sold by one contract; for that would sensibly increase the vendor's trouble of perusing and executing the assurance completing the contract; and in any case he could only be required to do so on the terms of being paid the extra expense so occasioned, and also, it is thought, on condition that he were not asked to assure lands accurately described as one entire property in the contract by several new descriptions of the particular parts thereof (*x*). If a purchaser desire to take a conveyance in lots of lands offered to him for purchase by private contract as one entire estate, he should certainly insert an express stipulation to that effect in the contract (*y*).

Sale of lands subject to incumbrances.

Where the whole estate in the land sold is not vested in the vendor, as where it is subject to mortgages or other charges or incumbrances, which have to be paid off, discharged, or released,

(*x*) See Sug. V. & P. 559; 1 Dart, V. & P. 503, 5th ed.; 573, 6th ed.; 531, 7th ed. It is submitted that the *dictum* of Jessel, M. R., in *Egmont* v. *Smith*, 6 Ch. D. 469, 474, that in no case can a vendor object to convey the sold property in parcels on receiving the whole purchase money, and on being paid the additional expense, is not correct. The vendor's obligation is to convey the land which he has contracted to sell. What that land is, is shown by the description thereof contained in the contract for sale. If the vendor has shown a good title, that is, has proved his right to convey what he contracted to sell, including the identity of the land described in the contract with that described in the title deeds, *and with that of which possession is offered* (above, pp. 40, 88), it appears that the vendor cannot be obliged to convey and to covenant for title by other descriptions than those under which he sold. But lands sold as one entire property can seldom be conveyed in lots without a number of new descriptions. This consideration alone, it is submitted, exhibits the inaccuracy of the late M. R.'s *dictum*. Besides, it takes no account of the increased trouble, apart from the extra expense, which may be laid on the vendor.

(*y*) Note that such a stipulation was actually made, in the case of *Egmont* v. *Smith*, ubi sup.

to enable the vendor to convey such an estate as he contracted to sell (*z*), it appears that, if by the contract the vendor purported to sell the whole estate as vested in himself without disclosing the state of the title, and in the absence of any stipulation to the contrary, the purchaser is in strict right entitled to require the vendor at his own expense to get in all the outstanding estates and interests and vest them in himself or in a trustee for himself, in order that the conveyance to the purchaser may be one simple deed of assurance from the vendor, or from him and his trustee, to the purchaser (*a*). But it has never been the practice to insist on this right, except in circumstances of extreme complication (*b*); and, as we shall see, it is not to the purchaser's interest to allow the legal estate to be conveyed to the vendor, where the land sold is heavily incumbered; so in most cases the conveyance is taken by one deed, to which the incumbrancers, as well as the vendor, are parties. If, however, by reason of the number of estates or interests outstanding in persons, who were not parties to the contract of sale, the expense of preparing the instrument of conveyance is sensibly increased, the purchaser is entitled to require the vendor to bear the extra expense so occasioned (*c*): though where the contract shows that the property is subject to charges or incumbrances, which must be released in order to make a good title, it does not appear that the vendor is liable to contribute to the cost of preparing the conveyance (*d*).

The usual stipulation as to the costs of conveyance.

As we have seen (*e*), it is and has long been the practice to stipulate expressly in conditions of sale by auction that the vendor and all other necessary parties, if any, shall execute a proper assurance of the property to the purchaser; and that the purchaser shall bear the expense of preparing, making and doing, not only this assurance, but also every other assurance and act, if any, which shall be required by the purchaser for getting in, surrendering or releasing any outstanding estate, right, title or interest, or for completing or perfecting the

(*z*) Above, pp. 88, 150.
(*a*) Sug. V. & P. 557; Dart, V. & P. 722, 5th ed.; 814, 6th ed.; 723, 7th ed.; see *Reeves* v. *Gill*, 1 Beav. 375, and the comments thereon in Sug. V. & P. 558.
(*b*) Sug. V. & P. 557; and see *Jones* v. *Lewis*, 1 De G. & S. 245.
(*c*) Sug. V. & P. 558; 2 Dart, V. & P. 722, 5th ed.; 814, 6th ed.; 723, 7th ed.; see *Jones* v. *Lewis*, 1 De G. & S. 245.
(*d*) Sug. V. & P. 558.
(*e*) Above, pp. 61, 66.

vendor's title, or for any other purpose. It has been decided that, where the purchaser expressly undertakes, in words as wide as these, to bear the expense of preparing, *making and doing* every assurance *and act* necessary to get in any outstanding estate or perfect the vendor's title, he is bound to pay the whole expense of the concurrence in the conveyance to him of the vendor's mortgagees (*f*), or of the execution of a deed of confirmation rendered necessary because of the imperfect execution of the conveyance to the vendor himself (*g*). But the understanding of the profession is that a condition of sale in the above form is not intended to throw upon the purchaser the expense of the perusal on behalf of and execution by the vendor himself of the conveyance of the property sold (*h*)—an expense for which the vendor is liable in absence of express stipulation to the contrary (*i*)—and the practice is for the vendor to bear this expense himself, although the contract contain this condition. It has been held that the stipulation in question does not cast upon the purchaser the expense of deducing the title to any outstanding estate (*k*).

Discharge of incumbrances on sale by payment into Court.

Under the Conveyancing Act, 1881 (*l*), upon the sale, either by the Court (*m*) or out of Court (*n*), of land subject to any incumbrance (including any mortgage, lien or charge of a portion or annuity or other capital or annual sum, whether immediately payable or not), the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court of a sum of money sufficient to provide for the amount charged on the land and future costs, expenses and

(*f*) *Re Willett and Argenti*, 60 L. T. 735, explained and distinguished in *Re Sander and Walford's Contract*, 83 L. T. 316; 1900, W. N. 183. *Re Willett and Argenti* appears to have given to the usual condition of sale a greater effect than it was previously supposed to have: see Davidson, Prec. Conv. vol. i. p. 612, 4th ed.

(*g*) *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 437, affirmed, 1898, 2 Ch. 211.

(*h*) It should be noted, however, that, according to this form, the purchaser does literally undertake to bear the expense of *making* the assurance to himself.

(*i*) Sug. V. & P. 561; 2 Dart, V. & P. 707, 5th ed.; 798, 6th ed.; 714, 7th ed.

(*k*) *Re Adams' Trustees and Frost's Contract*, 1907, 1 Ch. 695, 703; above, p. 67, n. (*c*).

(*l*) Stat. 44 & 45 Vict. c. 41, s. 5; see sect. 2 (viii.). This Act was amended by stat. 1 & 2 Geo. V. c. 37, s. 1.

(*m*) See *Patching* v. *Bull*, 30 W. R. 244; *Dickin* v. *Dickin*, ib. 887.

(*n*) See *Milford, &c. Co.* v. *Mowatt*, 28 Ch. D. 402.

interest (*o*); and the Court may, if it thinks fit, and either after or without notice to the incumbrancer, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale. This enables a vendor to procure land, which is subject to mortgages or charges, to be conveyed to the purchaser for an unincumbered estate without the concurrence of the incumbrancers. But it appears that the Court will not oblige the vendor, at the purchaser's instance, to adopt this mode of conveying an unincumbered estate, where such a course would involve hardship, as where the amount required to be paid into Court would greatly exceed the purchase money (*p*).

Vendor should never be allowed to obtain the legal estate.

It should be noted, in connexion with the release of incumbrances, that, where the legal estate is outstanding in mortgagees or trustees, the purchaser should never require or allow the vendor to take a reconveyance or conveyance thereof to himself before completing the purchase (*q*). The reason of

(*o*) For the purpose of deciding what sum ought to be so paid into Court, the Court will make a declaration as to future rights: *Re Freme's Contract*, 1895, 2 Ch. 256, 778, 780. The incumbrancer's security is not confined to the money so paid into Court and the investments thereof; he has also a security on the purchase money and a remedy against the vendor in the case of the depreciation of such investments; *Re Wilberforce's Trusts*, 1915, 1 Ch. 94.

(*p*) *Re Great Northern Rail. Co. and Sanderson*, 25 Ch. D. 788.

(*q*) See *General Finance, &c. Co.* v. *Liberator, &c. Socy.*, 10 Ch. D. 15, 20. The importance of always observing the precaution, that a person paying off a mortgage should take a conveyance of the mortgaged estate direct from the mortgagee to himself, is well illustrated by the case of *Manks* v. *Whiteley;* though the results arrived at in that case depend in some respects on the law peculiar to Yorkshire. In that case a vendor of land in Yorkshire suppressed a second mortgage thereof which he had made. The purchaser bought with the aid of a third party, who advanced the money to pay off the first mortgage on condition that he himself should have a first mortgage on the property. The purchaser's solicitor acted for all parties in carrying out the sale. He actually paid off the first mortgage with the third party's money, and obtained the title deeds from the first mortgagee for the third party's benefit; but on completion the vendor was allowed to take a reconveyance from the first mortgagee to himself, and then to convey to the purchaser, who conveyed by way of mortgage to the third party. The second mortgagee afterwards claimed that, under the doctrine of *Toulmin* v. *Steere*, 3 Mer. 210 (see above, p. 476), upon payment off of the first mortgage the charge thereby created merged in the inheritance and his security became the first charge on the property. It was held by Parker, J., that, in the circumstances of the case, sufficient intention was shown to keep the charge created by the first mortgagee alive for the benefit of the purchaser's mortgagee, and that he was protected, to the extent of the amount secured by the first mortgage, against the second mortgagee's claim, but that the second mortgagee

Manks v. *Whiteley.*

this is that, if the vendor should, while he was entitled to the equity of redemption or other equitable estate in the lands, have executed a conveyance by way of mortgage or otherwise and containing a precise recital, if the lands were thereby assured for an estate in fee simple in possession, that he was seised of them in fee, or in other cases that he was entitled to the legal estate therein, then he and all persons claiming under him would be estopped from denying that he was so seised, or entitled. It would follow that upon the reconveyance or conveyance of the legal estate to the vendor, the same would in effect pass at once to the persons entitled under the mesne conveyance. As against those persons, the purchaser, claiming by a subsequent conveyance from the vendor, would be subject to the same estoppel, and would be precluded from alleging that the mesne conveyance passed an equitable estate only, and that he himself held the legal estate as a purchaser for value without notice of the mesne conveyance (*r*). The purchaser would thus be affected by mesne incumbrances created by the

should have priority over the rights of the purchaser. In the Court of Appeal this decision was reversed by two judges to one, who considered that the first mortgage *did* merge and the second mortgagee should have the first charge on the property. In the House of Lords the decision of Parker, J., was restored, but only on the grounds that the purchaser's mortgagee was entitled to such rectification of the deeds constituting his security as would keep the first mortgage alive for his benefit, and that the second mortgagee, claiming under the mortgagor, could not take advantage of the mortgagor's fraud to obtain priority for his own mortgage. In that case the purchaser and those claiming under her were precluded from relying on their legal estate for protection and from tacking by the Yorkshire Registries Act, 1884; stat. 47 & 48 Vict. c. 54, s. 16. All the securities were registered, but no search was made in the Yorkshire Registry on behalf of the purchaser or her mortgagee. See *Manks* v. *Whiteley*, 1911, 2 Ch. 448, 453, 457 *sq.*, reversed, 1912, 1 Ch. 735, restored on other grounds, nom. *Whiteley* v. *Delaney*, 1914, A. C. 132; and as to rectification, below, Chap. XIII. § 2.

(*r*) An ambiguous recital not precisely averring (in the case of freeholds) the vendor's legal seisin would not have the same effect; for instance, a recital that he was seised of or otherwise well entitled to the lands, for he might well be entitled in equity though not at law. Neither would any such estoppel result from a mere conveyance of lands, without any recitals, by lease and release or grant; for these are innocent conveyances, passing only the assuror's actual estate or interest, if any. Nor would any such estoppel arise from the fact of the vendor having entered into express or the statutory covenants for title. See *Bensley* v. *Burdon*, 2 S. & S. 519, 8 L. J. Ch. 85; *Right* d. *Jefferys* v. *Bucknell*, 2 B. & Ad. 278; *Doe* d. *Gaisford* v. *Stone*, 3 C. B. 176; *Heath* v. *Crealock*, L. R. 10 Ch. 22; *General Finance, &c. Co.* v. *Liberator, &c. Socy.*, 10 Ch. D. 15; *Onward, &c. Socy.* v. *Smithson*, 1893, 1 Ch. 1; *Poulton* v. *Moore*, 1915, 1 K. B. 400.

vendor, which he might have avoided if he had not allowed the vendor to obtain the legal estate. The right course, therefore, for the purchaser to take is to require that any legal estate outstanding in mortgagees or trustees shall be conveyed by them to him, or to a trustee for him, direct. He will then be able to rely on the doctrines of purchase of the legal estate for value and without notice and of tacking, if the vendor should have created intermediate equitable incumbrances, of which the purchaser knew nothing (*s*). It is thought that, as the vendor is in equity a trustee for the purchaser of the land sold from the date of the contract for sale (*t*), and as the purchaser is entitled to restrain any disposition of the legal estate about to be made to his prejudice by the vendor pending completion (*u*), and is entitled to take his conveyance in what form he pleases and to keep alive any mortgage for his own benefit, if he desire to do so (*v*), the purchaser is entitled to insist that any outstanding legal estate shall be conveyed direct to himself, or to a trustee for him, and shall not, pending completion, be got in by and assured to the vendor. But compliance with such a requirement can only be ensured where the mortgage is to be paid off out of the purchase money. If the vendor propose to pay off the mortgage out of his own resources before completion and take a reconveyance to himself, it does not appear that the purchaser can prevent him from doing so; for if the purchaser were to bring an action for specific performance of the contract, he would be obliged to accept the title so offered, if in other respects good according to the contract (*x*).

Purchase followed by an immediate mortgage.

It constantly happens that a purchaser completes the sale with the assistance of some other person, who advances part of the purchase money and takes a mortgage of the lands sold to secure the repayment of his loan. In such cases it is a common practice for the whole estate in the lands purchased to be conveyed to the purchaser, and to be mortgaged by him to the lender by a deed executed immediately after the execution of the conveyance, the conveyance and the other title deeds being transferred directly from the vendor's into the new mortgagee's

(*s*) Above, pp. 455, 461, 535, 536.
(*t*) Above, pp. 480, 488 *sq.*
(*u*) Above, p. 494.
(*v*) *Cooper* v. *Cartwright*, Joh. 679, 685.
(*x*) See above, p. 83; below, Chap. XIX. § 3.

custody. It was pronounced by a late learned judge (*y*), that if in a case like this the property sold were in mortgage at the time of the sale, the new mortgagee should never allow the legal estate to get into the purchaser's hands. There is no doubt that it is always preferable for an intending purchaser or mortgagee of lands, which are already in mortgage, to take a conveyance of the legal estate direct from the former mortgagee, as that secures the same priority over mesne incumbrances as the former mortgagee had. But in the case of a purchase followed immediately by a mortgage, the risk run by the new mortgagee allowing the legal estate to be conveyed to the *purchaser* is very different from and far less than that incurred by a purchaser allowing an outstanding legal estate to be got in by the *vendor*. In the latter case the vendor has presumably been in possession of the land, and has had both the right and the opportunity of creating mesne incumbrances. In the former instance the purchaser has never been in possession either of the land or of the title deeds; and it is only by fraud that he can have executed, prior to the new mortgage, such a conveyance as would estop the new mortgagee from claiming the legal estate. A fraudulent mortgage of this kind, induced by false title deeds, was in fact made by an intending purchaser of land in the case which called forth the learned judge's remarks: but as the mortgage deed contained no recitals at all, there was no estoppel as against the mortgagee from the purchaser. He suffered, however, the inconvenience of defending an action brought against him by the prior mortgagee. This shows that the only quite safe course is to follow the learned judge's advice (*z*). But the common practice is still pursued in many such cases, partly on account of its convenience, and partly because the only risk run is that of fraud, which is an exceptional occurrence.

Purchaser receiving notice of mesne incumbrances.

In connexion with the subject of getting in the legal estate direct from a first mortgagee as a protection against mesne incumbrances, the reader may be reminded that, if the purchaser

(*y*) Jessel, M. R., *General Finance, &c. Co.* v. *Liberator, &c. Socy.*, 10 Ch. D. 15, 20.

(*z*) The excellence of this advice was demonstrated by the case of *Manks* v. *Whiteley*, 1911, 2 Ch. 448, reversed, 1912, 1 Ch. 735, restored on different grounds, 1914, A. C. 132. The long protracted litigation in that case would have been avoided if the course so recommended had been followed; above, p. 585, n. (*q*).

receive notice, actual or constructive, before the purchase money be fully paid, of some mesne equitable incumbrance, he cannot safely complete without the incumbrancer's concurrence in the conveyance to him (*a*); and further that if, after the receipt of such notice, the purchase should be completed with the concurrence only of the first mortgagee, who on being paid off out of the purchase money conveyed the legal estate and released his security, the purchaser would not be able to avail himself of the priority, which was enjoyed by the first mortgagee, as a protection against the mesne incumbrance, unless the intention appeared to keep alive for his own benefit the charge created by the first mortgage (*b*). In such a case, therefore, this intention should be clearly expressed in the deed of conveyance, though it would not be necessary to take an actual transfer of the first mortgage to a trustee for the purchaser (*c*). As we have seen (*d*), the purchaser is entitled, if he think fit, to keep alive for his own use any mortgage existing on the property sold either by express declaration or by having the same transferred to a trustee for him, or to a new mortgagee advancing part of the purchase money, provided always that he pay any increased expense thereby caused to the vendor. It may be thought that, where a mortgage is paid off out of the purchase money, it would always be desirable to keep alive the charge, in order to protect the purchaser against any mesne incumbrance of which he might, without knowing it, have received constructive notice (*e*). But it never was, and is not now, the practice to do this, the risk run being too small to counterbalance the inconvenience of always maintaining the charge (*f*). And under the present law as to constructive notice, the purchaser is no longer in danger of being affected with any notice acquired by his solicitor in some previous transaction of an equitable charge on the property (*g*). Where part of the purchase money

(*a*) Above, pp. 535, 536; *Jared* v. *Clements*, 1903, 1 Ch. 428.
(*b*) Above, p. 457.
(*c*) Above, p. 457.
(*d*) Above, pp. 457, 587.
(*e*) This was the case in *Toulmin* v. *Steere*, 3 Mer. 210; above, p. 456.
(*f*) If the charge be kept alive, it remains the *personal* estate of the party entitled to it; above, pp. 415, 458. See Davidson, Prec. Conv. vol. ii. pt. i. 290, 324, 327, 4th ed., from which it is obvious that it was not the practice to keep alive a mortgage paid off out of the purchase money unless there were reason to suspect the existence of some mesne incumbrance: 1 Key & Elph. Prec. Conv. 483, 490, 4th ed.; 566, 568, 10th ed.
(*g*) Above, pp. 232-239.

is to be advanced by a new mortgagee, who requires that the legal estate shall be conveyed direct from some already existing mortgagee to himself (*h*), the purchaser must take care that the whole estate in the lands sold be conveyed to the new mortgagee by the deed of conveyance completing the sale and a new equity of redemption limited to himself by the same deed. He will then be as well protected against unknown prior equities as the new mortgagee himself, for he will claim as purchaser under the same conveyance of the legal estate. But if he were to allow the new mortgagee to take a simple transfer of the old mortgage and himself take a conveyance from the vendor alone, he would be exposing himself to all the risks attendant on the purchase of an equity of redemption (*i*).

Purchase of land in Yorkshire.

On the purchase of land in Yorkshire, where the protection of the legal estate, acquired for value without notice of a prior registered equitable incumbrance, and the doctrine of tacking have been abolished, it may be thought that the only safe course for a purchaser buying land in mortgage is to keep the charge alive for his own protection, by express declaration in the conveyance (*j*). But if an exhaustive search be made in the Yorkshire Registry, without discovering any registered incumbrance (*k*), the inconvenience of keeping the charge alive would seem to outweigh the risk run.

Framing the conveyance.

It is beyond the scope of the present work to give a complete account of all the principles and rules which ought to be observed in framing conveyances on sale. A few points must, however, be noted. And first, as to the extent to which the vendor's title should be recited or noticed. This will depend on the state of the title: but the general principle to be observed is that any recitals or statements inserted in the conveyance should not carry the history of the title any further back than is necessary in order to explain the assurance thereby made (*l*).

Recitals.

(*h*) Above, pp. 587, 588.

(*i*) Above, pp. 452 *sq.*

(*j*) See stat. 47 & 48 Vict. c. 54, ss. 14, 16; *Manks* v. *Whiteley*, 1911, 2 Ch. 448, reversed, 1912, 1 Ch. 735, restored on different grounds, 1914, A. C. 132; above, pp. 364, 456, 588, n. (*z*).

(*k*) In *Manks* v. *Whiteley*, ubi sup., no such search was made; and if it had been, the second mortgage would have been discovered and the litigation avoided; see above, pp. 567, n. (*f*), 585, n. (*q*), 588, n. (*z*).

(*l*) See 1 Dart, V. & P. 518, 5th ed.; 590, 6th ed.; 545, 7th ed.

Thus, where on investigation of the title, the vendor has proved that he is himself absolutely entitled to the whole estate contracted for in the land sold, it is in general unnecessary to show in the conveyance how he became so entitled. In such cases recitals may be dispensed with altogether (*m*). The old conveyancing practice, however, was to recite the conveyance to the vendor (*n*): although, as we have seen (*o*), if any recital at all be made, it is best for the purchaser that it should be a precise recital (as of the vendor's seisin in fee, in the case of freeholds) sufficient to estop the vendor and all claiming under him from setting up a legal estate, which they have not at the time of conveyance, but may subsequently acquire (*p*). But it is thought to be permissible to depart from this principle where the vendor's title depends on proof of facts, as distinguished from deeds or other assurances (*q*). In such cases it is often convenient to recite the facts in order that on any resale of the land to be made after twenty years' time, the recitals may be used as *primâ facie* evidence of the facts (*r*). For example, where the vendor became entitled to the land sold as the heir of an intestate, it is very useful to recite the various matters of pedigree which establish the heirship (*s*); and this is particularly the case where the fact material to the title is negative, as that one had or left no issue (*t*). The utility of similar recitals is equally obvious where the vendor's title depends on the determination of an estate tail or of successive estates tail. Where land sold is subject to outstanding estates or incumbrances, which are all got in or released by the deed of conveyance (*u*), it will, as a rule, be necessary to recite the assurances under which the various conveying parties claim; and this may of course involve the statement of the title prior to the acquisition of the land by the vendor: but in these cases also the same principle should be observed of not carrying the title further back than is necessary to explain the operative part of the deed.

(*m*) See Davidson's Prec. Conv. vol. i. p. 44; vol. ii. pt. i. pp. 229 *sq.*, 4th ed.
(*n*) Wms. Real Prop. 140, 363, 1st ed.; 192, 514, 13th ed.; 748, 23rd ed.
(*o*) Above, p. 586.
(*p*) Sug. V. & P. 558.
(*q*) See 1 Dart, V. & P. 519, 5th ed.; 591, 6th ed.; above, p. 107.
(*r*) See above, p. 125.
(*s*) Above, pp. 120, 139; see also, p. 126.
(*t*) Above, p. 121.
(*u*) Above, p. 584.

The draftsman's aim should be to frame a deed which shall be capable of serving as a good root of title (*v*) in time to come. For this reason it is desirable that the conveyance should show clearly the origin of every outstanding estate or interest assured, but should contain no reference to any documents or matters which it would be inconvenient to produce or explain on any future dealing with the land, when the present conveyance might be treated as the root of title. For this reason also no assurance or other document, which is not a necessary part of the title, should ever be recited or noticed. Thus contracts for the sale of land, which are in general superseded by the conveyances made in pursuance thereof, should never be stated in recital as being entered into by some particular document, unless in exceptional circumstances making that document an essential part of the title (*x*). The agreement only to sell is commonly referred to in conveyances on sale, the written memorandum of the contract not being mentioned (*y*). As we have seen (*z*), the vendor cannot be required to execute a deed containing any recital which is contrary to the truth: but he cannot object to execute an assurance, which will duly carry out his obligation of conveying the property sold, but contains no recitals (*a*).

Parcels.

With respect to the parcels or description of the property sold, it appears that the purchaser is entitled to have inserted in the conveyance such a description of the property sold as will clearly identify the land intended to be assured. If, therefore, the description of the property sold contained in the contract be misleading, inadequate or obsolete, the purchaser should insert in the draft conveyance an accurate description of the land, according to its present condition, prepared from his own surveyor's report; and it is thought that in these circumstances the vendor could not refuse to convey the land by the new description (*b*). It is, however, questionable whether a vendor, who has sold lands by a description accurately applying to them, and has completely discharged the obligations imposed

(*v*) Above, p. 98.
(*x*) See above, p. 505.
(*y*) 1 Dart, V. & P. 524, 5th ed.; 595, 596, 6th ed.; 550, 7th ed.; above, p. 591, nn. (*m*), (*n*).
(*z*) Above, p. 580.
(*a*) *Hartley* v. *Burton*, L. R. 3 Ch. 365.
(*b*) See Davidson, Prec. Conv. i. 82 *sq.*, 4th ed. The above passage in the text (p. 557, 1st ed.) was approved of by Swinfen Eady, J., in *Re Sansom and Narbeth's Contract*, 1910, 1 Ch. 741, 749.

on him of proving the identity of the lands described in the contract with those described in the muniments of title and with those of which possession is offered (*c*), can be required to convey and to covenant for title by a different description from that by which he sold. If he has satisfactorily proved title and identity, his only remaining obligation seems to be to convey what he has contracted to sell, that is, the land described in the contract; and it is thought that in such case he cannot be compelled to undertake the burden of verifying a new description of the lands (*d*). We have seen that the vendor lies under a double duty in respect of proving identity; he is bound, first, to identify the land described in the contract with that described in the title deeds, and secondly, to identify the actual land offered by him in fulfilment of the contract with that described in the contract (*e*). It is thought that, where the vendor's second duty cannot be performed without extrinsic evidence explanatory of the description in the contract (*f*), the purchaser is entitled to have such a description inserted in the conveyance as will on the face of it identify the land thereby conveyed with that of which he is to be put in possession. But if the description contained in the contract be of itself completely sufficient to identify the land sold with that offered in fulfilment of the contract, it is submitted that the purchaser is not entitled to require any other or further description to be inserted in the conveyance.

When is the purchaser entitled to a conveyance by reference to a plan?

The important question, in what cases is the purchaser entitled to have the property conveyed by reference to a plan, can only rightly be solved by applying these principles. This question arose in two recent cases: but in each of them the judge evaded the necessity of deciding it (*g*). In *Re Sparrow and James' Contract*, Farwell, J. (after remarking that it was unnecessary to determine the general question whether the purchaser is in all cases entitled to have a description of the property conveyed by reference to a plan), considered that, where the description contained in the contract is insufficient

Re Sparrow and James' Contract.

(*c*) Above, pp. 40, 132, 161.
(*d*) Above, p. 582, and n. (*x*).
(*e*) Above, pp. 33, 39, 40.
(*f*) See above, p. 5.
(*g*) *Re Sparrow and James' Contract*, 1910, 2 Ch. 60, 62; *Re Sansom and Narbeth's Contract*, 1910, 1 Ch. 741, 750, 751.

or unsatisfactory as a means of identifying the land sold with that proposed to be conveyed in fulfilment of the contract, the purchaser is entitled to have the property more precisely described; and in the circumstances of the case the learned judge decided that the purchaser was entitled to have the description in the contract supplemented (without any restriction) by a plan (*h*). In *Re Sansom and Narbeth's Contract*, Swinfen Eady, J., afterwards Lord Swinfen, M.R. (after citing with approval the above-noted passage in this book (*i*)), laid down that in all simple cases, in which a plan would assist the description, the purchaser has a right to have a plan on the conveyance, and that this follows as part of the rule that the purchaser is entitled to take a conveyance in his own form: though the learned judge declined to say that in every case the purchaser is entitled to have a description by plan (*j*). It is respectfully submitted that this pronouncement is unsatisfactory in principle; and that a sounder rule is suggested in the judgment of Farwell, J., viz., that, where the description in the contract is without a plan insufficient to identify the property sold, the purchaser may require it to be supplemented by a plan. It seems to be implied from this that no plan can be required where the description in the contract affords a sufficient and satisfactory identification of the land sold. The question remains however whether, when the description in the contract is of itself (without extrinsic evidence) insufficient to identify

Re Sansom and Narbeth's Contract.

(*h*) See the judgment in *Re Sparrow and James' Contract*, 1910, 2 Ch. 60, 62, 63. Note, however, that in that case a plan was attached to the conditions of sale, with a statement to the effect that it was for reference only and its accuracy was not guaranteed. The purchaser proposed to take a conveyance by a general description referring to more particular descriptions in a schedule and a plan. The vendor desired to have the words "by way of elucidation and not of warranty" inserted before the reference to the plan; and the point actually decided was that, the fact being that the verbal description was of itself alone insufficient to identify the land, the vendor was not entitled to insist on the insertion of those words.

(*i*) Above, p. 592, n. (*b*).

(*j*) *Re Sansom and Narbeth's Contract*, 1910, 1 Ch. 741, 749, 750. In that case the contract contained only a general description of the property sold not defining the measurements or boundaries thereof; and it seems clear that the purchaser (unless precluded by the fact that the vendors sold as trustees; see below, pp. 593, 597) was entitled to a more detailed description than was contained in the contract. In the latest title deed under which the vendors claimed the property was described by reference to a plan; it was agreed before the summons came on for hearing that the purchaser should have a copy of this plan on his conveyance; and the summons was only heard to determine the question of costs. It was decided that the vendors must pay them.

the land sold, the purchaser is entitled to insist that this description shall be elucidated by a plan and not merely by a further and better verbal description. On this point the above-mentioned decisions are authorities in favour of the purchaser's right to a conveyance by reference to a plan. But it is respectfully submitted that, where the land sold can be satisfactorily identified by a further or better verbal description than is contained in the contract, and the vendor offers to convey by such a description, it does in truth subject the vendor to an additional burthen if he be required also to convey by reference to a plan, which he must necessarily employ (and pay) his own surveyor to check. And it is further submitted that the rule, that the purchaser may take his conveyance in what form he pleases, is qualified by the proviso that the burden laid on the vendor by the purchaser's choice be not materially increased, in respect of expense or otherwise (*k*). With great respect for the late Lord Swinfen, it is thought that he did not make sufficient allowance for this limitation of the rule. In the present state of the authorities, vendors of land should be particularly careful, where they desire not to convey by reference to a plan, to describe the property sold in the contract with complete verbal accuracy, or to stipulate expressly that they shall not be required to convey by reference to a plan, or at least that any reference in the conveyance to a plan shall be made solely by way of illustration of the verbal description of the property sold and not so as to make the plan any part of the description by which the vendor conveys (*l*).

Description independent of or by reference to a plan.

It is always desirable, in the purchaser's interest, that the conveyance should contain a complete verbal description, independent of any plan, of the property sold and that any plan of the land referred to or drawn on the deed should be auxiliary only (*m*). If, as is sometimes unavoidable, the property is so

(*k*) Above, p. 583. See an article on the subject above discussed in 26 L. Q. R. 268: but it is respectfully submitted that the learned author has overlooked the vendor's double duty of identification, and the fact that in a contract to sell land the property sold may be described with sufficient certainty to make the contract specifically enforceable, although the vendor may be obliged to resort to extrinsic evidence to prove that the actual land offered in fulfilment of the contract is the same as that sold; above, pp. 5, 592, 593.

(*l*) See below, Appendix (A), General Condition 9.

(*m*) 1 Dart, V. & P. 530, 5th ed.; 601, 6th ed.; 554, 7th ed.; Davidson, Prec. Conv. i. 85, 86, 4th ed.; i. 65, 66, 5th ed. It may be noted

described by reference to a plan that the plan is made a material part of the description (*n*), extreme care should be taken in checking the accuracy of the plan (*o*). When lands are conveyed by a new description not contained in any of the title deeds, it is always desirable in framing the deed of conveyance to connect the new description with the old by stating that the lands were formerly known by the old description (giving it) (*p*). Such a statement will in twenty years become *primâ facie* evidence of identity on sales (*q*). When mortgagees, who are paid off, or trustees join in a conveyance on sale, they are not, as a rule, bound to convey by any other description than that by which the land was conveyed to them (*r*). If in such cases a new description be desirable for and can be required by the purchaser, and the mortgagees or trustees will not abate anything of their strict rights, the conveyance must be so framed that the mortgagees or trustees convey by the old description, and that any conveyance of the land by the new description or any statement that the land conveyed by the old description is now more accurately described by the new is the conveyance or statement of the vendor only. Trustees of lands under a simple trust are, however, bound to *execute the*

Connecting a new description with the old.

Mortgagees and trustees convey by the description under which they took.

that the converse of the question above discussed may arise, viz., whether the purchaser can require a verbal description by measurements and boundaries to be inserted in the conveyance, when the land sold is described in the contract by reference to a plan. The writer is not aware of any authority on this point, but it can only be decided by applying the principles above stated; see pp. 592 *sq.* As to the sale of an estate by plan in Scotland, see *Gordon Cumming* v. *Houldsworth*, 1910, A. C. 537.

(*n*) See above, p. 106.

(*o*) For instances of the effect of a conveyance of lands described by reference to a plan, which was inaccurate, see *Llewellyn* v. *Jersey*, 11 M. & W. 183; *Lyle* v. *Richards*, L. R. 1 H. L. 222; *May* v. *Platt*, 1900, 1 Ch. 616; *Horne* v. *Struben*, 1902, A. C. 454; *Mellor* v. *Walmesley*, 1904, 2 Ch. 525; 1905, 2 Ch. 165; *Eastwood* v. *Ashton*, 1915, 2 Ch. 39, reversed, 1914, 1 Ch. 68, restored, 1915, A. C. 900. For an example of a reference to a schedule of parcels and a plan controlling a general description, see *Barton* v. *Dawes*, 10 C. B. 261; *Re Brocket*, 1908, 1 Ch. 185, 195, 196. For a case of an ambiguous general description being controlled by recitals, see *Walsh* v. *Trevanion*, 15 Q. B. 733. For a case of land being described correctly in area, but incorrectly by boundaries, which, if truly stated, would enclose a much larger area, see *Watcham* v. *A.-G. of East Africa Protectorate*, 1919, A. C. 533. And see *Norman* v. *Norman*, 1919, 1 Ch. 297, where land was described correctly as to the tenant's occupation, but ambiguously as to the person of whom it had been purchased.

(*p*) Davidson, Prec. Conv. i. 83, 4th ed.; i. 63, 5th ed.

(*q*) Above, p. 125.

(*r*) *Goodson* v. *Ellisson*, 3 Russ. 583, 594; see *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376.

estate (*s*); and if the equitable interest therein become vested by assignment or otherwise in several persons, of whom each is entitled in severalty to a particular parcel of the lands, the trustees must at the request of all convey to each the legal estate in his own part; and this may of course involve their conveying by a new description (*t*). But there is an oft-cited *dictum* of Lord Eldon (*t*) that a trustee cannot be compelled to divest himself of his trust by different parcels at different times. It appears, however, that an assignee from the *cestui-que-trust* of a part of the trust property is entitled, on proving to the trustee that the whole equitable estate or interest in that part is now vested absolutely in himself, to require the trustee to convey to him the legal estate or interest therein (*u*). Where trustees are themselves vendors of land, it does not appear that they are exonerated from the duties of identifying the land offered in fulfilment of the contract with that described therein and of conveying the land sold by a description sufficient to establish such identity, even though they sold as trustees (*v*). Mortgagees cannot be *required* to release from their security any part of the land charged without the whole amount due to them being paid (*x*). But mortgagees entitled for their own benefit may

Release by mortgagees from their security of *part* of the land mortgaged—

(*s*) Wms. Real Prop. 182, 191, 23rd ed.

(*t*) *Goodson* v. *Ellisson*, 3 Russ. 583.

(*u*) This is clearly established with regard to funds of money or stock, &c.: *Smith* v. *Snow*, 3 Madd. 10; *Lenaghan* v. *Smith*, 2 Ph. 301, 302; *Re Radcliffe*, 1892, 1 Ch. 227; *Re Palmer*, 1907, 1 Ch. 486; and it seems from the decree ultimately made that this principle was really recognised by Lord Eldon in *Goodson* v. *Ellisson*, 3 Russ. 596, subject to the trustee's right to be protected by the order of the Court in a case of doubt or difficulty. As to the assignee of an equitable estate or interest from tenant for life and remainderman, see *Firmin* v. *Pulham*, 2 De G. & S. 99; *Re James*, 1896, 1 Ch. 250; cf. *King* v. *King*, 1 De G. & J. 663; *Hannah* v. *Hodgson*, 30 Beav. 19, 28, 29; *Re Radcliffe*, 1892, 1 Ch. 227; Lewin on Trusts, 565 and n. (*i*), 566, 6th ed.; 880 and n. (*h*), 881-2, 12th ed.

(*v*) See *Re Sansom and Narbeth's Contract*, 1910, 1 Ch. 741, 749; above, p. 594, n. (*k*); though in that case it was considered that the trustees themselves took under a conveyance referring to a plan.

(*x*) The rule was that the only right enforceable by a mortgagor, and those claiming under him, against a mortgagee, whose estate had become absolute at law, was the equity of redemption on repayment of principal, interest and costs: *Dunstan* v. *Patterson*, 2 Ph. 341, 345; *Chichester* v. *Donegall*, L. R. 5 Ch. 497, 502. This rule has been modified by enactments in the Conveyancing Act, 1881, obliging mortgagees to execute a transfer of their mortgages, instead of reconveying, on the terms on which they would be bound to reconvey, and giving to mortgagors under mortgages made after that year the right to inspect the title deeds of the mortgaged property: but otherwise it remains in full force. See stats. 44 & 45 Vict. c. 41, ss. 15, 16; 45 & 46 Vict. c. 39, s. 12; *Teevan* v. *Smith*, 20 Ch. D. 724; above, pp. 114, 115, and notes.

By trustee-mortgagees on receiving the whole price.

Gratuitous release by mortgagees of part of their security—

By trustee-mortgagees.

of course do so, if they please. And it has been held that mortgagees, who are trustees, have power to release a part of the mortgaged property from their security, on a sale by the mortgagor, if they receive *the whole* of the purchase money produced thereby (*y*). It sometimes happens, however, where a small portion of lands in mortgage is sold, that the mortgagees, being satisfied that the remainder of the lands is an ample security for the money due to them, concur in the conveyance to the purchaser to convey the legal estate and release their charge without receiving any part of the purchase money. ' No difficulty can arise when this course is taken, if the mortgagees be beneficially entitled to the mortgage money, or if the purchaser have no notice that they are not so entitled (*z*). In either case he takes as a purchaser for value from the mortgagees, they conveying to him at the mortgagor's request in consideration of his paying the purchase money to the mortgagor; and there is no question of the adequacy of this consideration as regards the mortgagees, where they are apparently entitled for their own use. But if the purchaser should have notice that the mortgagees are trustees of the mortgage money, the question arises whether they have power, as against their *cestui-que-trusts*, to release gratuitously any part of their security. It is said that, at least where the trustees have the usual power of varying investments, they are justified in so releasing a portion of the property charged, provided that their security is not substantially impaired (the transaction being equivalent to the calling-in and re-investment of the money secured), and that the purchaser is entitled to assume that their power has been properly exercised (*a*). But it must not be forgotten that trustees advancing money on mortgage of land have no right to release any part of the land charged for the mere convenience of the mortgagor (*b*); even in exercising an express power to release or compromise a claim, they are bound to act reasonably and in good faith for the advantage of their *cestui-que-trusts*(*c*). It seems, therefore, that where mortgagees, being to the knowledge of the purchaser trustees, release part of the mortgaged

(*y*) *Re Morrell and Chapman's Contract,* 1915, 1 Ch. 162.

(*z*) Above, p. 225.

(*a*) Davidson, Prec. Conv. vol. ii. pt. i. 347, n., 4th ed.; see Dart, V. & P. 612, 5th ed.; 689, 6th ed.; 630, 7th ed.

(*b*) See Lewin on Trusts, 495, 6th ed.; 706, 10th ed.

(*c*) See *Blue* v. *Marshall,* 3 P. W. 381; *Pennington* v. *Healey,* 1 C. & M. 402, 407; *Re Alexander,* 13 Ir. Ch. 137.

lands to a purchaser without any valuable consideration given to them, they act, *primâ facie*, to the disadvantage of their *cestui-que-trusts*, and the purchaser appears to take the risk of proving that the transaction was proper; failing which the release would be invalid against the beneficiaries (*d*). And it is certainly advisable for a purchaser, proposing to accept such a conveyance from trustee-mortgagees, to satisfy himself that their security will not be impaired in any substantial degree by the release, and to obtain evidence of this fact, which he can produce on any future sale or mortgage of the land.

General words.

As is well known, before the year 1882 it was the practice in drawing conveyances of land to add to the *parcels*, or description of the property to be assured, a number of *general words*, comprehending all easements, rights, privileges or advantages appertaining or reputed to appertain thereto or therewith used and enjoyed (*e*). This addition was unnecessary and of no effect as regards any rights legally appendant or appurtenant to the land conveyed; for all such rights pass by a conveyance of the land without being mentioned (*f*). But so far as the general words comprised any privileges or advantages *used or enjoyed* with the land conveyed, they might have the effect of an express grant by the conveying party, as a legal easement or right, of some privilege or advantage previously used or enjoyed, for the benefit of or in connexion with the land conveyed, over some other land of his own (*g*). Since the Conveyancing Act, 1881 (*h*), took effect, it has been the practice to omit general words from conveyances in reliance on the provisions contained in the 6th section of that Act. These provisions

(*d*) See *Pell* v. *De Winton*, 2 De G. & J. 13; Dart, V. & P. 612, 613, 5th ed.; 689, 690, 6th ed.; 630, 631, 7th ed.

(*e*) Wms. Real Prop. 193, 331, 515, 13th ed.; 465, 674, 684, 23rd ed.; Davidson, Prec. Conv. vol. i. 91 *sq.*; vol. ii. pt. i. 231, 4th ed.

(*f*) Litt. s. 183; Co. Litt. 121 b; Williams on Commons, 315; *Beddington* v. *Atlee*, 35 Ch. D. 317, 326.

(*g*) *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Barkshire* v. *Grubb*, 18 Ch. D. 616; Williams on Commons, 170, 315-319, 323, 324; Wms. Conv. Stat. 64-66. On a grant of land "with the appurtenances," the word *appurtenances* may be used in a secondary meaning as including some privilege used or enjoyed in fact (though not as of right) at the time of conveyance over some other land of the grantor, and so may operate as a grant of such privilege as a right; *James* v. *Plant*, 4 A. & E. 749, 765; *Thomas* v. *Owen*, 20 Q. B. D. 225, 231, 232; *Hansford* v. *Jago*, 1921, 1 Ch. 322, 331.

Secondary meaning of *appurtenances*.

(*h*) Stat. 44 & 45 Vict. c. 41, which came into operation immediately after the 31st December, 1881; see Wms. Conv. Stat. 60 *sq.*

resemble the general words formerly in use, not only in including in conveyances a superfluous assurance of all easements and rights appertaining to the land conveyed, but also in incorporating therein an express conveyance of all privileges or advantages enjoyed with the land conveyed *at the time of conveyance* (*i*); and this conveyance may operate, in the same manner as general words, to grant, as a legal easement or right, some privilege or advantage enjoyed in fact at the time of conveyance for the benefit of the land assured over other land belonging to the grantor (*j*). It is therefore necessary to consider what easements or like privileges a purchaser of land may require to be conveyed to him.

What easements or other privileges the purchaser can require to be conveyed to him.

A contract for the sale of a piece of land passes (equally with a conveyance at common law of the legal estate therein (*k*)) only such rights, privileges or easements as are legally appendant or appurtenant thereto; and does not, in the absence of special stipulation, entitle the purchaser to have conveyed to him any privileges or advantages which were used by the vendor in connexion with the land sold over adjoining or other land of his own, but are not *necessary* for the enjoyment of the property as sold. This is equally the case whether the land be sold with or without mention of "the appurtenances," unless the parties' intention appear to be to use the word *appurtenances* in its secondary meaning (*l*) of privileges in fact used as accessory to the enjoyment of certain land (*ll*). And the 6th section of the

(*i*) This does not exactly follow the usual form of general words, which mentioned all rights, &c. *now or heretofore* enjoyed with the land. As to the effect of this difference, see *Hall* v. *Byron*, 4 Ch. D. 667, 671, 672; Wms. Conv. Stat. 68.

(*j*) *Broomfield* v. *Williams*, 1897, 1 Ch. 602; *International Tea Stores Co.* v. *Hobbs*, 1903, 2 Ch. 165; *Lewis* v. *Meredith*, 1913, 1 Ch. 571; *Hansford* v. *Jago*, 1921, 1 Ch. 322, 331, 332; *Westwood* v. *Heywood*, 1921, 2 Ch. 130; *White* v. *Williams*, 1922, 1 K. B. 727, deciding that the privileges or advantages mentioned in this enactment include profits *à prendre*, such as a sheepwalk, and are not confined to easements. Cf. *Quicke* v. *Chapman*, 1903, 1 Ch. 659.

(*k*) *Harding* v. *Wilson*, 2 B. & C. 96; *Barlow* v. *Rhodes*, 1 Cro. & M. 439; *Pheysey* v. *Vicary*, 16 M. & W. 484; *Worthington* v. *Gimson*, 2 E. & E. 618; *Baird* v. *Fortune*, 7 Jur. N. S. 926; *Brett* v. *Clowser*, 5 C. P. D. 376; *Baring* v. *Abingdon*, 1892, 2 Ch. 374; Wms. Real Prop. 330, 331, 13th ed.; 465, 23rd ed.

(*l*) See above, p. 599, n. (*g*).

(*ll*) *Bolton* v. *Bolton*, 11 Ch. D. 968; *Barkshire* v. *Grubb*, 18 Ch. D. 616, 620; *Re Peck and London School Board*, 1893, 2 Ch. 315; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595; *Re Walmsley and Shaw's Contract*, 1917, 1 Ch. 93. But, of course, if the vendor induce

Conveyancing Act, 1881 (*m*), affects only conveyances of land made by deed and does not apply to contracts for the sale of land (*n*). It follows, therefore, that if the conveyance, as drawn on the purchaser's behalf, incorporate tacitly, according to the present practice, the provisions of this enactment, and these provisions would, if uncontrolled, operate to grant to the purchaser as an easement or a right some advantage previously enjoyed in fact by the vendor, but not included in the contract for sale, the vendor is entitled to require that words shall be inserted modifying the statutory provisions to the extent necessary to give to the contract for sale its true effect (*o*). And in such cases the vendor should be most careful to have the effect of the enactment in question duly limited by express words, or he may find, after conveyance, that he has subjected the land retained by him to some easement or other right which he did not intend to grant when he made the contract for sale (*p*). If so, he will have no remedy but to bring an action for the rectification of the conveyance; and this relief (apart from fraud) will be granted only in case of common and not of unilateral mistake (*q*). If, however, the use of some privilege or advantage over adjoining land retained by the vendor be necessary to the proper enjoyment, as contemplated by the contract (*r*), of the property sold, the purchaser will be entitled

the purchaser to enter into the contract by a representation that he shall have some privilege over other land of the vendor's, the vendor cannot enforce the contract without granting the same as a legal right: see the last mentioned case. See also *Birmingham, &c. Banking Co.* v. *Ross,* 38 Ch. D. 295; *Burrows* v. *Lang,* 1901, 2 Ch. 502; *Godwin* v. *Schweppes, Ld.,* 1902, 1 Ch. 926; above, pp. 412, 413. So the sale of a house having windows overlooking land not belonging to the vendor implies no warranty that the vendor has a right to the access of light through those windows: *Greenhalgh* v. *Brindley,* 1901, 2 Ch. 324; *Smith* v. *Colbourne,* 1914, 2 Ch. 533; but if the vendor were to represent (contrary to the fact) that he had such right, he could not enforce the contract.

(*m*) Stat. 44 & 45 Vict. c. 41 (see sect. 2 (v)); above, p. 599.

(*n*) *Re Peck and London School Board,* 1893, 2 Ch. 315, 318.

(*o*) *Re Peck and London School Board,* 1893, 2 Ch. 315; *Re Hughes and Ashley's Contract,* 1900, 2 Ch. 595; *Re Walmsley and Shaw's Contract,* 1917, 1 Ch. 93.

(*p*) See *Broomfield* v. *Williams,* 1897, 1 Ch. 602; *Pollard* v. *Gare,* 1901, 1 Ch. 834; *International Tea Stores Co.* v. *Hobbs,* 1903, 2 Ch. 165.

(*q*) 2 Dart, V. & P. 744, 5th ed.; 838, 839, 6th ed.; 742, 743, 7th ed.; *May* v. *Platt,* 1900, 1 Ch. 616; see below, Chap. XIII. § 2.

(*r*) See *Bayley* v. *Great Western Rail. Co.,* 26 Ch. D. 434, 441, 442, 452, 453; above, pp. 412, 413.

to have that privilege or advantage granted to him by the conveyance as a legal easement or right (*s*). Indeed, where the easement would be necessary and continuous, as in the case of a right to the access of light, or even necessary only, such as a way of necessity (*t*), a grant thereof would be implied from the mere conveyance of the land to which it was necessarily accessory. But in such cases the purchaser is not obliged to rest content with such grant as would be implied in law from the conveyance of the land. He is certainly entitled to have such an express grant of the privilege or advantage in question as would be made by incorporating in the conveyance, without any restriction, the statutory general words. And since the object of the conveyance is to carry out with certainty the intention of the parties to the contract, it is thought that, if the conveyance as drawn on the purchaser's behalf contain a grant defining accurately in express words some privilege or advantage impliedly sold by the contract and to be enjoyed over some land retained by the vendor, the vendor cannot object to execute the conveyance in that form. As the vendor may, where necessary, exclude or restrict the operation of the statutory general words and, in place thereof, define his liabilities in express and unambiguous terms (*u*), so the purchaser is not obliged to accept the general description of his rights which would be given by such general words (a description which cannot be reduced to certainty without proof of the facts existing at the time of conveyance (*v*)), but is entitled to have such rights particularly and exactly defined (*w*). Any easements or other accessory rights expressly mentioned in the contract as being included in the sale should of course be expressly granted in the conveyance.

(*s*) Parker, J., *Browne* v. *Flower*, 1911, 1 Ch. 219, 224-227; *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.*, 1921, 1 Ch. 200, 209, 217, 221, 226.

(*t*) See *Wheeldon* v. *Burrows*, 12 Ch. D. 31; *Broomfield* v. *Williams*, 1897, 1 Ch. 602, 610, 612; *Pollard* v. *Gare*, 1901, 1 Ch. 834; *Cable* v. *Bryant*, 1908, 1 Ch. 259; and consider the cases cited in the previous note. As to drains, see *Ewart* v. *Cochrane*, 7 Jur. N. S. 925, 4 Macq. 117; Williams on Commons, 319, 324.

(*u*) Above, p. 601.

(*v*) See the cases cited above, pp. 599, n. (*g*), 600, nn. (*i*), (*j*).

(*w*) See *Bolton* v. *Bolton*, 11 Ch. D. 968; *Barkshire* v. *Grubb*, 18 Ch. D. 616, 620; *Re Peck and London School Board*, 1893, 2 Ch. 315; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595; and consider *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342.

Purchaser's right to require notice of restrictive covenants or easements over other land of vendor's to be indorsed on a title-deed retained by vendor.

By the Conveyancing Act, 1911 (*x*), where land having a common title with other land is disposed of to a purchaser (other than a lessee or a mortgagee) who does not hold or obtain possession of the documents forming the common title, such purchaser, notwithstanding any stipulation to the contrary, may require that a memorandum giving notice of any provision contained in the disposition to him restrictive of user of, or giving rights over, any other land comprised in the common title, shall, where practicable, be endorsed on, or where impracticable, be permanently annexed to some one document selected by the purchaser but retained in the possession or power of the person who makes the disposition, and being or forming part of the common title. But the title of any person omitting to require an indorsement to be made or a memorandum to be annexed is not, by reason only of this enactment, to be prejudiced or affected by the omission (*y*).

Reservations in the vendor's favour.

Where the vendor has stipulated in the contract for the reservation in his own favour of any easement or other right over the land sold, care must be taken that due effect is given to such stipulation in the conveyance; otherwise the vendor will have no remedy to assert his right but to sue for rectification of the conveyance (*z*). The vendor may be entitled to some reservation over the property sold, not only by express agreement, but by implication from the circumstances surrounding the contract; as where the purchaser buys with notice of the fact that the adjoining property of the vendor is laid out for building, and access thereto across the land sold will obviously be necessary (*a*). And a vendor may by the like implication, as well as by express contract, be entitled to reserve to himself the unrestricted use of some adjoining land of his, which would otherwise have been subject to an easement or right (as to access of light) in the purchaser's favour (*b*); as where the purchaser of a house with windows overlooking land adjoining and retained by the vendor has notice that the land is laid out

(*x*) Stat. 1 & 2 Geo. V. c. 37, s. 11 (1). By sub-sect. 3, this section does not apply to dispositions of land registered under the Land Transfer Acts, 1875 and 1897.

(*y*) Sub-sect. 2.

(*z*) See *Teebay* v. *Manchester, &c. Rail. Co.*, 24 Ch. D. 572; Williams on Commons, 322; below, Chap. XIII. § 2.

(*a*) *Davies* v. *Sear*, L. R. 7 Eq. 427.

(*b*) See above, p. 601.

Rule as to reservations in vendor's favour.

for building in a manner obviously inconsistent with the acquisition by the purchaser of any such right (*c*). But except by virtue of such express or implied contract, the vendor has no claim to the reservation in his own favour of any right over the land sold, or, where the exercise of some easement or privilege over any adjoining land of his would otherwise be necessary to the enjoyment of the property sold, to the reservation in his own favour of such right of free use of the adjoining land as will exclude the acquisition of such privilege or easement (*d*). For example, if a vendor offer for sale by auction in different lots a house and land adjoining, which the windows of the house overlook, and the land be sold at the auction, but not the house, the purchaser of the land will be entitled to build thereon so as to obstruct the access of light to the windows (*e*). Whereas, if the house were sold but not the land, the purchaser would acquire by implication an easement of access of light over the land and the vendor would not be entitled to build so as to obstruct such access (*f*); unless, as we have seen, the purchaser bought with notice of the vendor's intention to build thereon in a manner inconsistent with the acquisition of such an easement (*g*). And if both lots were sold at the same time, the purchaser of the house would acquire an easement of the access of light over the land; for on a sale or conveyance at one and the same time to different persons of two tenements belonging to the same owner, there is implied, unless a contrary intention appear, a grant of all easements over one tenement which are necessary for the enjoyment of the other (*h*). Where two tenements belonging to one owner exercise each over the other some privilege necessary to their proper enjoyment, as where two houses are built together and supported by one party wall, then, on a sale or conveyance of one of the tenements, there will be

(*c*) See *Birmingham, &c. Banking Co.* v. *Ross*, 38 Ch. D. 295; *Godwin* v. *Schweppes, Ld.*, 1902, 1 Ch. 926.

(*d*) See above, pp. 600-602, and cases there cited.

(*e*) *Ellis* v. *Manchester Carriage Co.*, 2 C. P. D. 13; *Wheeldon* v. *Burrows*, 12 Ch. D. 31; *Beddington* v. *Atlee*, 35 Ch. D. 317; *Ray* v. *Hazeldine*, 1904, 2 Ch. 17.

(*f*) *Palmer* v. *Fletcher*, 1 Lev. 122; Holt, C. J., *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089, 1093; Thesiger, L. J., *Wheeldon* v. *Burrows*, 12 Ch. D. 31, 51; Jessel, M. R., *Allen* v. *Taylor*, 16 Ch. D. 355, 357, 358; *Cable* v. *Bryant*, 1908, 1 Ch. 259.

(*g*) Above, pp. 603, 604.

(*h*) *Swansborough* v. *Coventry*, 9 Bing. 305; *Barnes* v. *Loach*, 4 Q. B. D. 494; *Allen* v. *Taylor*, 16 Ch. D. 355; *Schwann* v. *Cotton*, 1916, 2 Ch. 120, 459.

implied, not only a grant of an easement of support in favour of the purchaser or other alienee, but also a reservation of the like easement to the owner retaining the other tenement (*i*).

Where the property is sold subject to some incumbrance.

If the property were sold subject to some particular incumbrance, which is to remain undischarged, such as a mortgage, restrictive covenants, an easement, or a subsisting tenancy for any term, the vendor is of course entitled to require that it shall be expressed in the conveyance that he conveys the land sold subject to the incumbrance in question. And the conveyancer acting for him should be particularly careful to see that this is done; as the statutory covenants for title, which are now usually incorporated in conveyances on sale, include covenants for right to convey and quiet enjoyment, subject only as *expressed* in the conveyance, and for freedom from incumbrances other than those subject to which the conveyance is *expressly* made (*j*). So that if the vendor omit to specify in the conveyance the incumbrance, subject to which he sold, and convey as beneficial owner, he lays himself open to an action on his covenants for title, to which his only defence would be to plead the terms of the contract for sale and counterclaim for rectification of the conveyance (*k*). Where the contract for sale contains the common stipulation (*l*) that the property is sold subject to all chief and other rents, rights of way and water and other easements (if any) charged or subsisting thereon, and to all leases, tenancies and occupations, whether mentioned in the particulars of sale or not, and to all rights and claims of lessees, tenants and occupiers, it may perhaps be argued that the vendor is in strict law entitled to insist that he shall convey according as he contracted to sell, namely, subject to these incumbrances; and that none the less, where the purchaser has inquired whether

(*i*) *Richards* v. *Rose*, 9 Ex. 218; Thesiger, L. J., *Wheeldon* v. *Burrows*, 12 Ch. D. 31, 59; and see *Jones* v. *Pritchard*, 1908, 1 Ch. 630, 635, 636.

(*j*) Stat. 44 & 45 Vict. c. 41, s. 7 (1A).

(*k*) See *Page* v. *Midland Rail. Co.*, 1894, 1 Ch. 11; *May* v. *Platt*, 1900, 1 Ch. 616; *Great Western Ry. Co.* v. *Fisher*, 1905, 1 Ch. 316; *Stait* v. *Fenner*, 1912, 2 Ch. 504; *Eastwood* v. *Ashton*, 1913, 2 Ch. 39, 51, reversed (but not on this point), 1914, 1 Ch. 68, restored, 1915, A. C. 900; below, Chap. XIII. § 2. As to obtaining rectification on this ground, see *Coldcot* v. *Hill*, 1 Ch. Ca. 15; *Feilder* v. *Studley*, Finch, 90; Sug. V. & P. 609; 2 Dart, V. & P. 786, 5th ed.; 886, 6th ed.; 794, 795, 7th ed.

(*l*) Above, p. 66, and n. (*b*).

there are any such incumbrances (*m*) and received the reply that the vendor is not aware of any (*n*). For as we have seen (*o*), it is only against such incumbrances as the vendor was not aware of that this stipulation has any force; and the vendor certainly appears to be entitled to limit his liability under the statutory covenants for title, so that he shall not be sued for any defects of title so arising. But it is not, and has never been, the practice of conveyancers to insert in conveyances on sale any words qualifying, by reference to possible incumbrances of this kind, either the assurance made or the covenants for title entered into by the vendor (*p*); for it is understood that the stipulation in question is merely intended to protect the vendor against any objection to the title on account of incumbrances of the kind mentioned, which may exist without the vendor's knowledge, and may be discovered in the course of the investigation of title, and that the purposes of the clause are exhausted when the title has been investigated without the discovery of any such incumbrance (*q*). And it would be a great hardship on the purchaser for such words to be inserted in the conveyance, as they would put everyone taking under the conveyance upon inquiry, whether there were such incumbrances or not (*r*). It is thought, therefore, that the Court would not oblige a purchaser, who bought under such a stipulation, to accept a conveyance, in which the assurance made by the vendor was qualified by such words, especially when it is considered that under an innocent conveyance (*s*) the vendor assures the land described for such estate or interest only as he really has therein and subject to all legal liabilities actually affecting the same (*t*). But it is thought that the vendor would be entitled to insist on limiting the statutory covenants for title so that they should not extend to

(*m*) Above, p. 163.

(*n*) It is submitted that if the vendor has answered positively that there are not any such incumbrances, he cannot insist on having the same mentioned in the conveyance.

(*o*) Above, pp. 66, n. (*b*), 163.

(*p*) This appears from an examination of the precedents contained in Davidson, Prec. Conv. vol. ii. pt. i. 4th ed., considered with reference to the fact that the stipulation in question is one of the general conditions of sale: Ibid. i. 611, 4th ed.; i. 521 and n., 5th ed. See also 1 Key & Elph. Prec. Conv. 260, n. (*c*), 4th ed.; 259, n. (*g*), 9th ed.; Davidson's Concise Precedents, 113 n. (*c*), 19th ed.

(*q*) Dart, V. & P. 153, 5th ed.; 176, 6th ed.; 172, 7th ed.

(*r*) *Re Alms Corn Charity*, 1901, 2 Ch. 750.

(*s*) Above, p. 586, n. (*r*).

(*t*) *Hardman* v. *Child*, 28 Ch. D. 712, 717.

indemnify the purchaser against any incumbrance, whether known or unknown, subject to which the sale was expressly made. It is not, however, the practice to insist on such a limitation with regard to the possible incumbrances specified in the above-mentioned common condition of sale. If in any particular case it were desired to insist on this limitation of the covenants, it should be carried out by a clause expressly modifying the effect of the statutory covenants and not by expressing that the conveyance is made subject to the incumbrances mentioned in the condition. If it be stipulated in the contract for sale that the property is sold *and shall be conveyed* subject to the incumbrances above mentioned (*u*), the purchaser cannot object to the insertion in the conveyance of the same words as are contained in the contract (*x*). The vendor cannot oblige the purchaser to take a conveyance of the land sold subject to any other incumbrances than those subject to which the purchaser expressly or impliedly (*y*) agreed to buy (*z*).

Sale of such estate as the vendor has.

If the vendor should have sold only such estate or interest as he has in some particular land, he is of course entitled to require that he shall convey the same thing only and in the same words. But if land were sold by a particular description, with a stipulation that the purchaser shall accept such title as the vendor has (*a*), the case is different, and the vendor would be obliged to convey the land as described in the contract, without any words limiting the assurance to his actual interest therein (*b*). In such case, however, it is thought that the contract is equivalent to an agreement to buy subject to such incumbrances or defects of title as may appear upon investigation to exist, and that the vendor would therefore be entitled to limit his covenants for title so as to prevent any action thereon being brought against him by reason of such incumbrances or defects (*c*). It may be observed that the usual vendor's qualified covenants for title,

Scope of the usual vendor's covenants for title.

(*u*) Above, p. 605.
(*x*) *Gale* v. *Squier*, 4 Ch. D. 226, 5 Ch. D. 625.
(*y*) As where the purchaser buys with notice that the land is subject to some irremovable incumbrance, and the vendor does not *expressly* contract to show a good title; above, p. 188.
(*z*) *Re Monckton and Gilzean*, 27 Ch. D. 555; *Hardman* v. *Child*, 28 Ch. D. 712; *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376; *Re Wallis and Barnard's Contract*, 1899, 2 Ch. 515.
(*a*) Above, p. 187.
(*b*) See above, p. 606.
(*c*) See the cases cited, above, p. 605, n. (*k*).

whether given in express terms or incorporated in the conveyance by statute, do not confer any indemnity against the purchaser's eviction by title paramount to that of the vendor's own predecessors in title; they extend only to the purchaser's disturbance by reason of some act, omission or incumbrance, of the vendor himself or any person through whom he derives title, otherwise than by purchase for value (*d*). A disseisor, therefore, or even a man having no title at all, not so much as a disseisor's estate (*e*), if he sold and conveyed *as beneficial owner* the land, into which he had wrongfully entered or which he had wrongfully assumed was his, would incur no liability on the statutory covenants for title in case of the ejectment of the purchaser by the rightful owner.

Sale of land subject to restrictive covenants.

If one sell a single piece of land on the terms that the purchaser shall enter into covenants restrictive of the use of the land, the vendor is of course not bound, in the absence of express or implied stipulation or of representation to the contrary, to enter into any similar covenants or to observe the like restrictions with regard to any adjoining land retained by him (*f*). If lands be offered for sale in lots, either at *one sale* by auction or in a series of consecutive private sales, on the terms that each purchaser shall enter into restrictive covenants as to the lot bought by him, it is, in the absence of express stipulation, a question to be decided on consideration of all the circumstances and conditions of the sale whether there is implied in the contract for the sale of any lot an agreement that the vendor shall be bound by the restrictive covenants as to any lot remaining unsold (*g*). If it appear that the offer made by the vendor was in effect that each purchaser should have a lot forming part of an estate subject to a general scheme of restrictive covenants enforceable by as well as against all owners of any part thereof, the vendor will be bound to enter into like restrictive covenants with the purchaser, as regards any lot remaining unsold; and

(*d*) *Browning* v. *Wright*, 2 B. & P. 13; *Hesse* v. *Stevenson*, 3 B. & P. 565, 574; *Nind* v. *Marshall*, 1 Brod. & B. 319; *Stannard* v. *Forbes*, 6 A. & E. 572; Sug. V. & P. 602, 603, 605-609; *Howard* v. *Maitland*, 11 Q. B. D. 695; and see below, Chap. XIX. § 5.

(*e*) This is an estate in fee simple: see Litt. ss. 519, 520; Williams on Seisin, 7, 10; *Leach* v. *Jay*, 9 Ch. D. 42, 44; 51 Sol. J. 143.

(*f*) See *Tucker* v. *Vowles*, 1893, 1 Ch. 195; *Rowell* v. *Satchell*, 1903, 2 Ch. 212; *Osborne* v. *Bradley*, 1903, 2 Ch. 446; above, p. 474, n. (*x*).

(*g*) Above, p. 471, and n. (*b*); *Nottingham Patent Brick, &c. Co.* v. *Butler*, 16 Q. B. D. 778, 784, 785; *Collins* v. *Castle*, 36 Ch. D. 243.

will be bound in equity to observe the restrictions, though he do not enter into any such express covenant (*h*). But if it appear that the vendor merely offered each lot to be sold subject to restrictive covenants to be entered into with himself by each purchaser, and did not offer, as part of the contract or as an inducement to buy, the advantage of the whole property put up for sale being subject to the same covenants, then the purchaser of any lot will have no claim to enforce any restriction over any lot remaining unsold, or to require the vendor to enter into any covenant in respect thereof (*i*). In any case in which it is either an express or an implied term of the contract for sale that any land retained by the vendor shall be subject to any restriction in the purchaser's favour, the purchaser is entitled to require the vendor on completion to enter into a covenant with him to that effect (*j*). The case is exactly parallel to that of an express or implied contract to grant an easement over land retained by the vendor (*k*). The purchaser's right in such case to have notice of the restrictions endorsed on some title deed, being part of the common title and retained by the vendor, has been mentioned above (*l*).

Estate clause.

The estate clause always inserted in conveyances of land before the year 1882, and purporting to assure all the conveying party's estate or interest in the land conveyed (*m*), went out of use after the commencement of the Conveyancing Act, 1881 (*n*); the 63rd section of that Act providing that every conveyance shall by virtue of that Act be effectual to pass all the conveying party's estate or interest in the property conveyed, but this enactment shall apply only if and as far as a contrary intention is not expressed in the conveyance and have

(*h*) See cases cited in previous note; *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342; *Davis* v. *Leicester*, 1894, 2 Ch. 208, 219, 227, 232; *Holford* v. *Acton Urban Council*, 1898, 2 Ch. 240; *Rowell* v. *Satchell*, 1903, 2 Ch. 212; *Elliston* v. *Reacher*, 1908, 2 Ch. 374, 384, 385, 665.

(*i*) *Tucker* v. *Vowles*, 1893, 1 Ch. 195; *Holford* v. *Acton Urban Council*, 1898, 2 Ch. 240; *Reid* v. *Bickerstaff*, 1909, 2 Ch. 305; above, p. 608, n. (*f*).

(*j*) *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342; *Davis* v. *Leicester*, 1894, 2 Ch. 208, 220.

(*k*) Above, pp. 601, 602.

(*l*) Above, p. 603.

(*m*) 1 Davidson, Prec. Conv. 94, 4th ed.; see Wms. Conv. Stat. 242; Wms. Real Prop. 685, 23rd ed.

(*n*) Stat. 44 & 45 Vict. c. 41.

effect subject to the terms of the conveyance and the provisions therein contained. Having regard to this express saving and to the construction placed on the estate clause formerly usual (*o*), it is thought to be unnecessary expressly to exclude the operation of that enactment upon conveyances assuring in proper terms less than the whole estate of the party conveying, such as leases for life or years, or gifts in tail. But if upon the sale of the fee simple, or other the vendor's whole estate in some land, it is stipulated that some exception or reservation shall be made, the same must of course be clearly defined in the deed of conveyance (*p*); for if all mention thereof be omitted, the deed will take effect at law according to its terms, and the vendor's only remedy will be an action for rectification of the conveyance (*q*).

Limitation of the purchaser's estate—

The reader may be reminded that, although a contract for the sale of land, without defining the estate to be sold therein, is intended to mean a sale of the freehold in fee (*r*), this rule has no application to a conveyance on sale, in which the estate to be taken by the purchaser must be duly limited or marked out, either by the use of the words necessary to convey the fee at common law, or by the exact expressions mentioned in the 51st section of the Conveyancing Act, 1881 (*s*). If, therefore, an estate in fee simple were sold, the land must be conveyed either to the purchaser and his heirs or to him in fee simple, and no other words will suffice to effect this or (excepting the words proper to confer an estate tail) will avail to convey a greater estate than for the grantee's life (*t*). And it must not

(*o*) See *Blundell* v. *Stanley*, 13 Jur. 998; *Hunt* v. *Remnant*, 9 Ex. 635; *Rooper* v. *Harrison*, 2 K. & J. 86, 113; *Neame* v. *Moorsom*, L. R. 3 Eq. 91; *Francis* v. *Minton*, L. R. 2 C. P. 543; 1 Davidson, Prec. Conv. 94, 95, 4th ed.

(*p*) See 1 Davidson, Prec. Conv. 95-98, 4th ed., also showing the difference between an exception and a reservation.

(*q*) Above, pp. 601, 605.

(*r*) Above, p. 39.

(*s*) Stat. 44 & 45 Vict. c. 41.

(*t*) *Re Ethel and Mitchells and Butler's Contract*, 1901, 1 Ch. 945, where the limitation was to the grantee *in fee;* Wms. Real Prop. 218, 23rd ed. It may be noted that it is sufficient if the proper words of limitation be contained in the *habendum* only of a deed, as where A. grants to B. All that farm called Blackacre To Hold the same unto and to the use of B. and his heirs, or in fee simple; see *Jenkins* v. *Young*, Cro. Car. 230; *S. C.*, nom. *Meredith* v. *Joans*, Cro. Car. 244; *Orme's Case*, L. R. 8 C. P. 281, 295-298, 300; *Spencer* v. *Registrar of Titles*, 1906, A. C. 503; Williams on Settlements, 4-7. It appears also that if

be forgotten that where the land sold is to be conveyed to a grantee to uses, it is equally necessary to limit to him an estate in fee simple in express and proper terms, otherwise he takes an estate for his own life only in the land conveyed, with the consequence that the same legal estate and no more will pass under the Statute of Uses (*u*) to the person or persons to whose use it is expressed that he shall hold the land (*x*). But if the purchaser should, through a mistake of this kind, acquire by the conveyance a less estate at law than he was entitled under the contract to have assured to him, he will nevertheless be entitled in equity to such an estate as he actually purchased in the land, and will be entitled to have the conveyance rectified accordingly (*y*). This consideration has an important bearing on cases where an equitable estate in lands is limited in a deed by words which would be insufficient to convey the fee if the estate were legal. It is now decided that equity follows the law to this extent, that a grant made by deed of an equitable estate in lands, by way of executed as distinguished from executory trust, to the grantee simply, without any words of limitation, will confer an estate for the grantee's life only (*z*). Thus, if A. agree with B. to buy the lands of which C. is seised in fee on trust for B. in fee, or to buy B.'s equity of redemption in the lands comprised in B.'s mortgage to D., and B. convey

of the estate of a grantee to uses.

Limitation by deed of equitable estates in land.

proper words of limitation of an estate in fee simple be contained in the granting part of a deed, but omitted in the *habendum*, that being to the grantee simply, and the parties' intention appear to be to confer on the grantee an estate in fee simple and not to restrict his rights by the *habendum*, this will be a sufficient limitation of the estate granted; see *Re Fayle and Irish Feather Co.'s Contract*, 1918, 1 I. R. 13; Co. Litt. 21 a; Shep. Touch. 102, Preston's ed.; Burton's Compendium, 169, 2nd ed.; 1 Davidson, Prec. Conv. 101-104, 4th ed.; 80-83, 5th ed.

(*u*) Stat. 27 Hen. VIII. c. 10.

(*x*) Above, p. 160.

(*y*) *Re Ethel and Mitchells and Butler's Contract*, 1901, 1 Ch. 945, 948; below, Chap. XIII. § 2.

(*z*) *Re Bostock's Settlement*, 1921, 2 Ch. 469, following the rule applied in *Re Whiston's Settlement*, 1894, 1 Ch. 661, and the cases there cited; *Re Irwin*, 1904, 2 Ch. 752; Farwell, L. J., *Re Thursby's Settlement*, 1910, 2 Ch. 181, 188, 189; and *Re Monckton's Settlement*, 1913, 2 Ch. 636; and overruling *Re Tringham's Trusts*, 1904, 2 Ch. 247; *Re Oliver's Settlement*, 1905, 1 Ch. 191; *Re Nutt's Settlement*, 1915, 2 Ch. 431; and *Re Gillies' Settlement*, 1917, 2 Ch. 205; in which cases it was held that, if a sufficient intention were shown in the deed to transfer the grantor's whole equitable interest in the land, the grantee would take an estate in fee simple, although there were no such words of limitation as are required to confer such an estate at law; see Wms. Real Prop. 195, 196, 23rd ed.

these lands to A. by a deed, in which the nature of the agreement between the parties is by recital or otherwise sufficiently shown and the payment of the purchase money is stated as the consideration, but which contains no words or no correct technical words of limitation of the fee simple to A., the limitation in the deed to A. simply confers on him a life estate only. But as, on the face of the deed, A. is clearly entitled to have it rectified by the insertion of proper words of limitation of an estate in fee simple to himself (*a*), and as the right of rectification, if established in a Court of equity, need not be carried out by an actual emendation of the defective instrument (*b*), it appears that A. is nevertheless entitled in equity to the entire equitable estate in the lands. In such a case, however, the conveyance ought properly to be taken to A. and his heirs or to A. in fee simple.

Vendor of land bound to give the usual covenants for title.

Every vendor of land, besides conveying the land sold to the purchaser, is bound, unless it appear from the contract that he was selling as a trustee or mortgagee (*c*), to enter into the usual qualified covenants for title. That is to say, he must covenant with the purchaser that he has power to convey the land as expressed in the conveyance, that the premises shall be quietly enjoyed and that the same are free from any incumbrance, and also, if the property sold were leasehold, that the lease is valid, the rent has been paid and the covenants performed: but all these covenants are limited to indemnifying the purchaser against disturbance by reason only of some act, omission or sufferance of the vendor himself, or of any of his predecessors in title subsequent to the last sale of the land or the last conveyance thereof for other valuable consideration whereon proper covenants for title were given (*d*), or of any persons claiming under him or them. So that if the vendor purchased the land himself, he will covenant against disturbance by reason only of his own acts or those of persons claiming

(*a*) Above, p. 611, n. (*y*).

(*b*) *White* v. *White*, L. R. 15 Eq. 247; *Hanley* v. *Pearson*, 13 Ch. D. 545; *Whiteley* v. *Delaney*, 1914, A. C. 132, 150 (above, p. 585, n. (*q*)); see below, Chap. XIII. § 2, at end.

(*c*) See *Worley* v. *Frampton*, 5 Hare, 560; Sug. V. & P. 69, 575; 1 Dart, V. & P. 550, 5th ed.; 622, 6th ed.; 573, 7th ed.; Wms. Real Prop. 449, 13th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 191, 261, n. (*n*), 296, n., 4th ed.; above, p. 69.

(*d*) See Sug. V. & P. 574; Davidson, Prec. Conv. 192, 261, n. (*o*), 4th ed.; 1 Dart, V. & P. 545, 5th ed.; 616, 617, 6th ed.; 568, 569, 7th ed.

under him. And the vendor must also covenant for further assurance by himself or any one claiming under or in trust for him or any such of his predecessors in title as aforesaid (*e*). And although, as we have seen (*f*), a contract to sell land is an absolute undertaking, express or implied, to sell the fee simple or other estate specified, *free from incumbrances*, it is settled that, in the absence of express stipulation to the contrary, a vendor of land is not bound to give, in the conveyance of the land, any manner of warranty of title other than is afforded by these qualified covenants (*g*). And no other warranty of title (*h*) is implied on a sale of land made by one, who assumes to deal therewith as owner, and completed by conveyance and payment of the purchase money (*i*). Indeed, under the present law, no warranty of or covenant for title is implied by the mere conveyance, on sale or otherwise, of any land (*k*); except only in the case of a demise for a term of years (*l*), and in certain cases of statutory conveyance where the word *grant* by force of some Act of Parliament implies covenants for title (*m*). But, as we have seen, on an executory agreement to sell land the vendor is bound to show a good title (*n*); and if one agree to buy land and be let into possession on payment of the purchase money and the vendor's title prove defective before the execution of a conveyance, the purchaser can recover the price paid as upon a total failure of consideration, for the contract was

No warranty of title now implied, as a rule, by the conveyance of land.

(*e*) *Browning* v. *Wright*, 2 B. & P. 13, 22; *Church* v. *Brown*, 15 Ves. 258, 263; *Blakesley* v. *Whieldon*, 1 Hare, 176, 181; Sug. V. & P. 574; 1 Dart, V. & P. 544, 545, 549, 5th ed.; 615-617, 621, 6th ed.; 567-569, 572, 7th ed.; Davidson, Prec. Conv. vol. i. 118, 203, n. (*b*); vol. ii. pt. i. 191, 205, 214, 215, 4th ed.; Wms. Real Prop. 448, 13th ed.; 666, 23rd ed.

(*f*) Above, p. 39.

(*g*) See note (*e*), above. For this reason, if the conveyance as prepared on the purchaser's behalf purport to assure the land to be held by him "free from incumbrances," the vendor should strike out these words, as they might import an unrestricted warranty at common law that the lands were free from incumbrances: see *Expte. Stanford*, 17 Q. B. D. 259, 271.

(*h*) *E.g.*, no such warranty of title as is implied by the modern law on the sale of goods: see Benjamin on Sales, 511-523, 2nd ed.; Wms. Pers. Prop. 594, 17th ed.

(*i*) *Clare* v. *Lamb*, L. R. 10 C. P. 334.

(*k*) Co. Litt. 348a and note (1); stat. 8 & 9 Vict. c. 106, s. 4; *Clare* v. *Lamb*, ubi sup.; *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98, 100.

(*l*) See Wms. Real Prop. 670, 23rd ed.; *Budd-Scott* v. *Daniell*, 1902, 2 K. B. 351; *Jones* v. *Lavington*, 1903, 1 K. B. 253; *Markham* v. *Paget*, 1908, 1 Ch. 697.

(*m*) See Wms. Real Prop. 669, 670, 23rd ed.

(*n*) Above, pp. 31, 88 *sq.*

not then completed (*o*). And this appears to be the case, notwithstanding that the title had been accepted (*p*); unless the purchaser had expressly agreed to accept such a title as exposed him to the risk attendant on the defect and the title contracted for had been duly shown to him (*q*). If, moreover, one induce another to buy land by untruthfully representing himself to be the freeholder in fee or absolute owner thereof, the purchaser will be entitled to relief on the ground of the misrepresentation and according as it were innocent (*r*) or fraudulent (*s*); the difference being that either an innocent or a fraudulent misrepresentation of this kind will be a good ground for rescinding or avoiding the specific performance of the contract while it remains uncompleted, but only a fraudulent misrepresentation will give rise to an action of deceit, or to a claim to set aside the conveyance after completion.

False representation by vendor that he is the owner of the land sold.

Sale by trustee as such.

If the vendor sold as a trustee, he cannot be required to give the usual vendor's covenants for title, but can only be called upon to covenant that he has done no act to incumber the property sold (*t*). But if a trustee enter into a contract to sell land, without disclosing his fiduciary character, the purchaser will, it is thought, be entitled to the same covenants as if the vendor were the beneficial owner (*u*). This should not be forgotten when it is desired to effect a sale by trustees without disclosing the trust. So a mortgagee selling as such under his power of sale is only bound to covenant that he has not incumbered (*v*), but would, it is thought, be liable to give the usual vendor's covenants as to title if he sold under an open contract. Where land held on a simple trust or in mortgage is sold by or

By mortgagee as such.

(*o*) *Johnson* v. *Johnson*, 3 B. & P. 162.

(*p*) See *S. C.; Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666; and above, pp. 169-171.

(*q*) See above, pp. 187-192.

(*r*) *Bree* v. *Holbech*, 2 Doug. 654; *Wilde* v. *Gibson*, 1 H. L. C. 605, 633; Selborne, C., *Brownlie* v. *Campbell*, 5 App. Cas. 925, 935-938; *Joliffe* v. *Baker*, 11 Q. B. D. 255; *Derry* v. *Peek*, 14 App. Cas. 337; *Onward Building Society* v. *Smithson*, 1893, 1 Ch. 1, 12; *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98; see also *Rudd* v. *Lascelles*, 1900, 1 Ch. 815, 818; below, Chap. XIV. § 1; XIX. § 5.

(*s*) *Edwards* v. *M'Leay*, G. Coop. 308, 2 Swanst. 287; *Hart* v. *Swaine*, 7 Ch. D. 42, as to which see *Brownlie* v. *Campbell* and *Joliffe* v. *Baker*, ubi sup.; *Derry* v. *Peek*, 14 App. Cas. 337, 365, 366, 371-374; below, Chap. XIV. § 1; XIX. § 5.

(*t*) Above, p. 612, n. (*c*).

(*u*) Above, p. 612.

(*v*) Davidson, Prec. Conv. vol. ii. pt. i. 296, n., 4th ed.

by the direction of the *cestui-que-trust* or the mortgagor or other person entitled to the equity of redemption, he must enter into the vendor's covenants for title, and the trustee or mortgagee concurring in the sale is only bound to covenant against his own incumbrances. And on a conveyance by mortgagor and mortgagee, it is the invariable practice to insert or incorporate in the deed of conveyance the usual qualified covenants for title by the mortgagor, notwithstanding that these appear to supersede and to deprive the purchaser of the benefit of the absolute covenants for title entered into by the mortgagor on the occasion of the mortgage (*x*). If land be sold by a trustee in bankruptcy professedly selling as such under the power of sale given to him by statute (*y*), he can only be required to covenant that he has done no act to incumber. It has, however, been the practice to require the bankrupt himself to concur in the conveyance and to covenant for title: but this cannot be insisted on, and the bankrupt's covenants are of little or no value (*z*). Where lands are sold by or by the direction of one entitled to some estate therein, with the intention that they shall be conveyed under some power exercisable by himself or by others with his consent (such as the power of sale given to a tenant for life by the Settled Land Act, 1882 (*a*), or the power of sale usually limited before that Act to the trustees of real settlements to be exercisable with the tenant-for-life's consent), he is bound to enter into the usual covenants for title (*b*). But where such person is tenant for life only and his covenants for title extend to the acts, &c. of any of his predecessors in title (*c*), it is the regular practice to limit these covenants by a proviso saving him from liability, as regards the remainder or reversion expectant on his life estate, for any other acts or defaults than those of himself or his own heirs or

By *cestui-que-trust* or mortgagor.

By trustee in bankruptcy.

Sale under power.

Proviso restricting tenant for life's liability under his covenants for title.

(*x*) Davidson, Prec. Conv. vol. ii. pt. i. 261, n., 293, n. (*c*), 4th ed.; 1 Key & Elph. Prec. Conv. 485, 4th ed.; 566, 10th ed.; Davidson's Concise Precedents, 145, 19th ed.

(*y*) Stat. 4 & 5 Geo. V. c. 59, s. 55, replacing 46 & 47 Vict. c. 52, s. 56.

(*z*) Sug. V. & P. 575; 1 Dart, V. & P. 552, 5th ed.; 624, 6th ed.; 575, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 618 and n., 4th ed.; 1 Key & Elph. Prec. Conv. 533 and n., 4th ed.; 611 and n., 10th ed.

(*a*) Above, pp. 282 *sq.*

(*b*) *Re London Bridge Acts*, 13 Sim. 176, 179; *Poulett* v. *Hood*, L. R. 5 Eq. 115; *Re Sawyer and Baring's Contract*, 53 L. J. Ch. 1104; Sug. V. & P. 575.

(*c*) Above, pp. 612, 613.

persons claiming under or in trust for him or them (*d*). And it would probably be held, where the nature of the interest of a tenant for life so selling or consenting to a sale appears from the contract, that he is entitled to insist on this restriction of his liability. But it is thought that this is not the case where he has sold as absolute owner. Thus, if one so entitled sold by an open contract, which he proposed to carry out by a conveyance by himself under the Settled Land Act, 1882, or by trustees under a power of appointment exercisable with his consent (*e*), it is submitted that he would be bound to give vendor's covenants for title unrestricted by any such proviso.

Sale by trustees for sale.

The case is analogous to a sale made by a trustee without disclosing his fiduciary character (*f*). If lands be vested in trustees on a special trust for sale, and they sell as such trustees, their receipts being good discharges (*g*), it does not appear that the purchaser is in strict right entitled to require the persons beneficially interested in the purchase money to join in the conveyance or to covenant for title (*h*): but it has been the practice of conveyancers to insist, if such persons were absolutely entitled and *sui juris*, that they should give the usual vendor's covenants for title as regards their shares (*i*). It is, however, usual on sales by trustees to stipulate expressly that the concurrence of the beneficiaries shall not be required and the purchaser shall be entitled to no other covenant than the trustees' covenant against incumbrances (*k*).

Sale by order of the Court.

Where lands belonging to one absolutely are sold by order of the Court, he must enter into the same covenants for title as if he himself had sold them; but where on such a sale the legal estate is in trustees and a good title to the equitable interest is given by virtue of the order for sale (*l*), the purchaser cannot require the concurrence

(*d*) 1 Dart, V. & P. 548, 5th ed.; 619, 620, 6th ed.; 571, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 261, n. (*o*), 262, 4th ed.; 1 Key & Elph. Prec. Conv. 453, n., 4th ed.; 533, n., 10th ed.

(*e*) Above, pp. 150, 265, 282 *sq.*

(*f*) Above, p. 614.

(*g*) Above, p. 271.

(*h*) See *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330; above, p. 614; and next note.

(*i*) Sug. V. & P. 574; 1 Dart, V. & P. 545, 546, 5th ed.; 617, 618, 6th ed.; 568, 569, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 275, n., 4th ed.; Wms. Real Prop. 449, 13th ed.; 667, 23rd ed.

(*k*) 1 Davidson, Prec. Conv. 613, 4th ed.; 1 Key & Elph. Prec. Conv. 264, n., 4th ed.; 279, n., 10th ed.; above, p. 69.

(*l*) Above, p. 449.

in the conveyance of the persons beneficially entitled, or oblige them to covenant for title (*m*).

The statutory covenants for title.

The present practice is to incorporate the requisite covenants for title or covenant against incumbrances (*n*) in conveyances on sale by using the expressions which cause such covenants to be "deemed to be included and to be implied" therein by virtue of the Conveyancing Act, 1881. By this Act (*o*), in a conveyance (*p*) for valuable consideration, other than a mortgage (*q*), there are implied on the part of anyone who conveys and is expressed to convey as beneficial owner, as regards the property expressed to be conveyed by him, and with the person or persons to whom the conveyance is made, covenants for right to convey, quiet enjoyment, freedom from incumbrances and further assurance, and in the case of leaseholds, for validity of the lease; all limited to the acts, omissions and sufferances of the person who so conveys, anyone conveying by his direction and anyone through whom he derives title otherwise than by purchase for value (not here including a conveyance in consideration of marriage), and persons claiming under him or them (*r*). And the like covenants are implied in a similar conveyance, in which it is expressed that one conveys by direction of another directing as beneficial owner, on the part of the person so directing (*s*). And in any conveyance there is

(*m*) Sug. V. & P. 574; *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330; 1 Dart, V. & P. 545, 5th ed.; 617, 6th ed.; 568, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 270-275 and notes, 4th ed. It is usual, however, so to stipulate: 1 Davidson, Prec. Conv. 661, 4th ed.; 593, 5th ed.

(*n*) Above, pp. 612-615.

(*o*) Stat. 44 & 45 Vict. c. 41, s. 7 (1) (a), (b). This section applies only to conveyances made after the year 1881: sect. 7 (8).

(*p*) In this section "conveyance" includes a deed conferring the right to admittance to copyhold or customary land; but does not include any other customary assurance, or a demise by way of lease at a rent; sect. 7 (5). "Conveyance" in the Act is confined to assurances made by deed on some dealing with or for property; sect. 2 (v).

(*q*) In a conveyance by way of mortgage, absolute covenants for title are implied on the part of any one, who conveys and is expressed to convey as beneficial owner: sect. 7 (1) (c), (d). And in a conveyance by way of settlement there is implied on the part of any one who conveys and is expressed to convey as settlor a covenant for further assurance limited to himself and every person deriving title under him subsequently to that conveyance: sect. 7 (1) (e).

(*r*) Due exceptions are made with regard to any estates, interests, or incumbrances, subject whereto the conveyance is *expressly* made, and the acts, &c. of persons claiming in respect thereof; see above, p. 605.

(*s*) Sect. 7 (2). And by sect. 7 (3), where a wife conveys and is expressed to convey as beneficial owner and her husband also conveys

implied a covenant against incumbrances by anyone who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition or under an order of the Court, such covenant extending to the conveying party's own acts only (*t*). But no covenant is implied in any conveyance by virtue of this Act where it is not expressed that some person conveys in one of the characters particularly mentioned in the Act; for instance, as beneficial owner or as trustee (*u*). The covenants implied by virtue of this Act may be varied or extended by deed (*x*). They may therefore, it is considered, be limited in any manner which will not altogether destroy the covenantor's personal liability. A proviso destroying altogether a covenantor's personal liability on the covenant is held to be repugnant and void (*y*). An instance of the limitation of the statutory covenants for title occurs in the proviso usually inserted in conveyances where the party covenanting for title is a tenant for life only (*z*). The benefit of a covenant implied by virtue of this Act is to be annexed and incident to and to go with the estate or interest of the implied covenantee, and to be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested (*a*). This is analogous to the law laid down with respect to express covenants for title. These run with the land; that is to say, they are enforceable by every one, who takes the covenantee's estate therein (*b*), or any part thereof (*c*). But they are not enforceable by one who acquires the land, but

Devolution of the benefit of the statutory covenants for title—

Of express covenants for title.

and is expressed to convey as beneficial owner, there are implied, besides the covenants implied as above mentioned by the use of these expressions, the same covenants as if the wife conveyed by the direction of the husband directing as beneficial owner, and also covenants by the husband in the same terms as the covenants implied on the part of the wife: see Wms. Conv. Stat. 87-91.

(*t*) Sect. 7 (1) (f).

(*u*) Sect. 7 (4).

(*x*) Sect. 7 (7).

(*y*) *Williams* v. *Hathaway*, 6 Ch. D. 544, 546; *Watling* v. *Lewis*, 1911, 1 Ch. 414; *Re Tewkesbury Gas Co.*, 1911, 2 Ch. 279, 285, affirmed, 1912, 1 Ch. 1.

(*z*) Above, p. 615.

(*a*) Sect. 7 (6).

(*b*) Co. Litt. 314 b, 385 a; *Middlemore* v. *Goodale*, Cro. Car. 503; *Campbell* v. *Lewis*, 3 B. & A. 392; Sug. V. & P. 576 *sq.*

(*c*) Farwell, J., *Rogers* v. *Hosegood*, 1900, 2 Ch. 388, 393; 9 Jarm. Conv. by Sweet, 366, 404; 2 Dart, V. & P. 779, 5th ed.; *Twynam* v. *Pickard*, 2 B. & A. 105.

does not take the covenantee's estate therein. Thus if A. conveyed land to B. and his heirs to such uses as C. should appoint and in default of appointment to the use of C. and his heirs and covenanted with C. for title, and C. afterwards *appointed* the land to the use of D. and his heirs, D. could not sue on the covenants for title, for he took an estate which defeated C.'s estate in the land (*d*). Although if C. had conveyed to D. his *estate* in the land, D. could have sued on the covenants for title. D. could also have sued on the covenants, if they had been made (as they should have been) with B., the grantee to uses; because then D. would, by virtue of the Statute of Uses (*e*), have taken the covenantee's estate in the land; and this would be the case, whether he had taken by appointment or grant from C. (*f*). Where the statutory covenants for title are employed, the implied covenantee is the person to whom the conveyance is made (*g*). This, in cases where the conveyance is made to uses intended to be executed by the Statute of Uses (*e*), is the grantee to uses; so that if the limitations of the conveyance include a power of appointment, an appointee thereunder will take the implied covenantee's estate and so be enabled to sue upon the covenants for title. But it appears equally true in principle of the statutory as of the express covenants for title that one cannot sue thereon, as assignee of the land to which they relate, unless he take the implied covenantee's estate therein.

Covenants for title on sale of an equitable estate.

If express covenants for title were given upon the sale of an equitable estate, as of an equity of redemption, an assignee of the purchaser's estate could not maintain an action at law upon the covenants in his own name, for there being no legal estate with which the covenant could run, he was regarded in law as a stranger to the covenant (*h*). It appears however that he might maintain an action at law in the name of the original covenantee, or his representatives, who would in equity be bound to allow his or their name to be used for the purpose. For in equity the benefit of the covenants for title would, in accordance with the manifest intention of the parties, run with

(*d*) *Roach* v. *Wadham*, 6 East, 289; Sug. V. & P. 578-580.
(*e*) Stat. 27 Hen. VIII. c. 10.
(*f*) Sug. V. & P. 578; *Spoor* v. *Green*, L. R. 9 Ex. 99, 105, 113.
(*g*) Above, p. 617.
(*h*) Sug. V. & P. 581; 9 Jarm. Conv. by Sweet, 366; *Onward Building Society* v. *Smithson*, 1893, 1 Ch. 1, 12.

the purchaser's estate in the land (*i*). But where the statutory covenants for title are given in the conveyance on sale of an equitable estate, it appears that an assignee of the purchaser's estate may well maintain an action at law in his own name upon the covenants, since the right of action thereon is by force of the above-mentioned provisions of the Conveyancing Act (*k*) annexed to the implied covenantee's estate or interest in the land conveyed to him; and it is thought that the right of action on the covenants is effectually so annexed to the covenantee's estate, whether his interest be legal or equitable.

Covenants for title obtained by fraud.

If on a conveyance of land covenants for title, express or statutory, be obtained by fraud, the covenantor may well plead the fraud, in avoidance of the contract, in any action brought against him on the covenants by the original covenantee. But if the covenantee assign over his estate in the land to a purchaser for value without notice of the fraud, the assignee will be entitled, as such, to enforce the covenants; and the covenantor will no longer be enabled to set up the plea of fraud (*l*).

Purchaser may take either express or the statutory covenants for title.

It seems to lie in the purchaser's option whether the covenants for title, which he is entitled to demand, shall be given by express words in the old form or by incorporation in the conveyance of the statutory covenants; for the purchaser is in general the arbiter of the form of the conveyance (*m*). But, as we have seen (*n*), the practice is to take the statutory covenants. If, however, the statutory covenants implied by the vendor's conveyance as beneficial owner would impose upon him any more extensive covenant than the contract obliges him to give, he will of course be entitled to have the operation of the statute duly restricted (*o*). Thus it has been already mentioned that

(*i*) See *Spencer* v. *Boyes*, 4 Ves. 370; *Riddell* v. *Riddell*, 7 Sim. 529, 533, 535; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388, 404; Sug. V. & P. 592, 593.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 7 (6); above, p. 618.

(*l*) *David* v. *Sabin*, 1893, 1 Ch. 523, overruling the *dictum* to the contrary in *Onward Building Society* v. *Smithson*, 1893, 1 Ch. 1, 13; see below, Chap. XIX. § 5.

(*m*) Above, pp. 581, 585-587. The same principle appears applicable in determining whether any other rights, to which the purchaser is entitled, shall be assured to him in express terms or by some statutory form; *e.g.*, whether express general words shall be inserted, or recourse had to the statute; above, pp. 599, 600.

(*n*) Above, p. 617.

(*o*) Above, p. 602.

a tenant for life not bound to covenant against the acts of the remaindermen or reversioners may so limit his liability (*p*). Again, we have seen (*q*) that a vendor is bound to covenant for title against his own acts and the acts of all his predecessors in title subsequent to the last sale of the land or other dealing therewith for value whereon proper covenants for title were given. But the statutory covenants are against the conveying party's own acts and the acts of all persons through whom he derives title otherwise than by purchase for value not including the consideration of marriage (*r*). If, therefore, the vendor derive title under a marriage settlement whereon proper covenants for title were given (*s*), it appears that in strict law he will not be bound to covenant for title against the acts of the settlor, and will be entitled to have the statutory covenants modified accordingly (*t*). In practice, however, vendors claiming under marriage settlements whereon proper covenants for title were given have frequently submitted to covenant against their settlors' acts (*u*).

Covenants for title on sale of copyholds.

On the sale of a legal estate in copyholds, the covenants for title must be given by a deed separate from the conveyance of the land, which will of course be by surrender and admittance (*x*); as the covenants cannot be entered on the court rolls. This may be accomplished by a deed either preceding or following the surrender. In the former case the deed takes the form of a covenant by the vendor to surrender the copyholds to the purchaser's use and the covenants for title are added; in the latter case the deed contains only the covenants for title. The latter course was formerly considered preferable, because

(*p*) Above, p. 615.
(*q*) Above, p. 612.
(*r*) Above, p. 617.
(*s*) It was the practice before the year 1882 for the settlor in a marriage or family settlement to give covenants for title qualified in the same manner as upon a sale: Davidson, Prec. Conv. vol. iii. 59, 275, 634, 861, 1027, 1120, 3rd ed.; Williams on Settlements, 126, 226. But since the Conveyancing Act, 1881, took effect, settlors have in many cases given only the covenant for further assurance implied under that Act by their conveying as settlor: above, p. 617, n. (*q*); 2 Key & Elph. Prec. Conv. 461, n., 562, 563, 704, 710, 4th ed.; 573, n., 683, 722, 794, 799, 10th ed.; Davidson's Concise Precedents, 528, 557 and n. (*a*), 19th ed.
(*t*) Sug. V. & P. 574; 9 Jarm. Conv. by Sweet, 375; Davidson, Prec. Conv. vol. ii. pt. i. 192, 237, n., 243, n., 254, n., 261, n., 4th ed.
(*u*) See 1 Dart, V. & P. 545, 5th ed.; 616, 6th ed.; 568, 7th ed.
(*x*) Wms. Real Prop. 527 *sq.*, 23rd ed.

it was doubted whether in the former case the covenants would run with the land, the covenantee having no legal interest therein previously to the surrender (*y*). It should be noted that the statutory covenants for title can only be incorporated in a deed conferring the right to admittance to copyhold land (*z*); so that if it be preferred to take the surrender before the covenants for title are entered into, they must be given by express words in the old form. As the right of action on the statutory covenants for title is expressly given to every person in whom is vested the whole or any part of the estate or interest of the implied covenantee, and it appears immaterial whether that estate were legal or equitable (*a*), there seems to be no doubt that, where such covenants are given by a deed of covenant to surrender copyholds upon a sale thereof, the purchaser's assigns will be enabled to sue at law upon the covenants. For this reason the usual course now is for the purchaser to take the statutory covenants for title upon the sale of copyholds, incorporating them in a deed of covenant to surrender the land to his use (*b*). It must be borne in mind, however, on the purchase of copyholds, that the purchase money should not be paid until the actual surrender of the land sold; for a surrender only can confer on the purchaser an indefeasible right to admittance (*c*).

Payment of price on sale of copyholds.

Where the land sold is to be conveyed subject to some incumbrance.

As has been already mentioned (*d*), where land is sold subject to some definite incumbrance, legal or equitable, whether it be a mortgage, charge, lease, easement, *profit à prendre*, restrictive covenant or other liability, it is proper to express in the conveyance that the land is conveyed subject to the incumbrance. And the vendor must be particularly careful to see that this is done, where the incumbrance was created by himself, or by some one against whose acts he is bound to covenant for title (*e*), and it is proposed to incorporate the statutory covenants for title. For these include covenants for right to convey, quiet

(*y*) Above, pp. 618-620; *Riddell* v. *Riddell*, 7 Sim. 529; Davidson, Prec. Conv. vol. ii. pt. i. 205-207, 364, 367, 4th ed.
(*z*) Stat. 44 & 45 Vict. c. 41, s. 7 (5); above, p. 617, and n. (*p*).
(*a*) Above, p. 620.
(*b*) 1 Key & Elph. Prec. Conv. 475 and n., 4th ed.; 558 and n. (*b*), 10th ed.; Davidson's Concise Precedents, 183, 19th ed.
(*c*) See Davidson, Prec. Conv. vol. ii. pt. i. p. 206, 4th ed.; Wms. Real Prop. 528, 529, 23rd ed.
(*d*) Above, p. 605.
(*e*) Above, pp. 612, 620.

enjoyment, and freedom from incumbrance, subject only to estates or interests subject whereto the conveyance was *expressly* made (*f*). So that in such cases unless the incumbrance, subject to which the land was sold, be expressly mentioned, the statutory covenants for title will in terms extend to guarantee indemnity against it; although the conveyance will only pass the vendor's actual interest in the land (*g*). The incumbrance diminishing the estate granted to the purchaser must therefore be exactly specified in the conveyance. If this were inadvertently omitted, the vendor would have no remedy against an action on the covenants but to claim rectification of the conveyance (*h*). On the other hand, if land, to which the vendor's title is defective, be sold, or accepted by the purchaser, with the stipulation that the vendor shall by his covenants for title guarantee indemnity against the risk of the defect, and the defect appear on the face of the conveyance, it must be plainly shown, where the statutory covenants for title are applicable and are relied on, that they are intended to cover the defect; otherwise it might be contended that the defect, being an incumbrance subject to which the conveyance was expressly made, did not come within the terms of the covenants. Of course, if in this or any other case the usual qualified covenants for title do not cover defects or possible defects of title, against which the vendor is by the contract of sale bound to guarantee indemnity, the statutory covenants for title must be modified accordingly or else, which is the better plan, the required covenants for title must be given in express terms duly showing the intention of the parties (*i*). Where covenants for title are particularly intended to guard against a known defect of title, which is not necessarily apparent, it is better that they should be contained in a deed separate from the conveyance; as it would not generally be desirable to show the defect on the face of the conveyance (*k*). In such case express covenants must be given, as the statutory covenants can only be incorporated in a deed of conveyance; but the statutory covenants might be given in the conveyance

Covenants for title intended to cover an apparent defect.

(*f*) See stat. 44 & 45 Vict. c. 41, s. 7 (1); above, pp. 612, 617, n. (*r*).
(*g*) Above, p. 606.
(*h*) Above, p. 605.
(*i*) See *Page* v. *Midland Rail. Co.*, 1894, 1 Ch. 11, 20; *May* v. *Platt*, 1900, 1 Ch. 616; 2 Dart, V. & P. 786, 5th ed.; 886, 887, 6th ed.; 794, 795, 7th ed.
(*k*) Sug. V. & P. 573; Davidson, Prec. Conv. vol. ii. pt. i. pp. 379, n., 381, 4th ed.

to prevent attention being attracted by their absence, and it might be provided in the separate deed that the covenants thereby given were intended to be additional.

Purchaser agreeing to observance of restrictions on the use of the land bought must enter into an absolute covenant to that effect.

In certain circumstances the vendor can require the purchaser to enter into some covenant with him by the deed of conveyance. Thus, if the contract for sale provide for the observance of certain restrictions on the use of the land sold, the purchaser is bound, on completion, to enter into a covenant to observe the restrictions (*l*); and in the absence of stipulation to the contrary, this covenant must be absolute, and the purchaser cannot insist that his liability thereunder shall be limited in any way, as by a proviso that he shall be released from liability if he re-sell the land and procure the new purchaser to enter into a similar covenant (*m*). If the parties intend that the benefit of some such restrictive covenant shall run with some particular land retained by the vendor, he should be careful that the covenant is so expressed that no doubt can arise as to the persons who will be entitled to enforce the covenant. It is, as we have seen (*n*), a question to be decided on consideration of all the circumstances and conditions of the sale whether the intention of the contracting parties was that the benefit of such a covenant should run with some particular land belonging to the vendor, or whether this benefit was meant to be confined to the vendor himself, his personal representatives, and his assigns of the benefit of the covenant. The purchaser can of course only be called upon to covenant as intended by the contract. If the contract do not in effect provide that the benefit of the covenant shall run with some particular land of the vendor's, the purchaser cannot be obliged to covenant in such a manner that the vendor's heirs and assigns of that land will be entitled as such, and not merely as assignees from the vendor of the benefit of the covenant, to enforce the covenant (*o*).

In what cases the purchaser is bound to indemnify the vendor.

When the vendor is bound under some covenant or contract to pay some money or do or observe some other act or thing in

(*l*) See above, pp. 469, 608.

(*m*) See *Pollock* v. *Rabbits*, 21 Ch. D. 466, decided on an express condition; but it is thought that the stipulation implied by law is the same.

(*n*) Above, pp. 467-470, 608.

(*o*) See *Renals* v. *Cowlishaw*, 9 Ch. D. 125, 129, 11 Ch. D. 866; *Spicer* v. *Martin*, 14 App. Cas. 12, 24; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388, 396, 403-408.

respect of the land sold or as the condition of retaining his interest therein, and the land is sold to be held by the purchaser on the same terms as the vendor held it, but the vendor will remain personally liable for any future breach of the covenant or contract, which may occur after the sale and conveyance of the land, the purchaser is bound on completion to enter into a covenant with the vendor promising to observe all the conditions on which it is intended that he shall hold the land and to indemnify the vendor against all liability in respect of any future breach of these conditions; and it is not necessary for the vendor to stipulate expressly in the contract for sale that the purchaser shall enter into such a covenant (*p*). For example, on the sale of leaseholds, which are subject to the payment of rent and the performance of onerous covenants, the purchaser must, if the vendor will remain under any liability in respect of the rent and covenants, covenant in the deed of conveyance thenceforth to pay the rent and perform the covenants and to indemnify the vendor against all liability by reason of any future omission to pay the rent or keep the covenants. The purchaser must therefore give this indemnity, where the vendor is the original lessee, or an assignee who has entered into a similar covenant on the assignment to himself, or the executor or administrator of such lessee or assignee (*q*). But in all such cases the sole object of the covenants so to be given by the purchaser is to secure the vendor's indemnity against any future breach of the conditions on which the land sold is held; and (except on the purchase of leaseholds) the purchaser is entitled to require that his covenant to observe these conditions shall be so expressed as not to impose on him any greater liability than this (*r*). On the sale of leaseholds the vendor can oblige the purchaser to covenant in the above-mentioned form, which has been established by long conveyancing practice: but such covenants will be construed as having been given by way of indemnity only, and not so as to confer

On sale of leaseholds.

(*p*) See *Pember* v. *Mathers*, 1 Bro. C. C. 52, 54; *Waring* v. *Ward*, 7 Ves 332, 337; *Staines* v. *Morris*, 1 V. & B. 8; *Wilkins* v. *Fry*, 1 Mer. 244, 263-266; *Moxhay* v. *Inderwick*, 1 De G. & S. 708; Sug. V. & P. 37, 38, 198; 1 Dart, V. & P. 557 *sq.*, 5th ed.; 628 *sq.*, 6th ed.; 579 *sq.*, 7th ed.; *Re Poole and Clarke's Contract*, 1904, 2 Ch. 173.

(*q*) See previous note. *Harris* v. *Boots, &c., Ltd.*, 1904, 2 Ch. 376, 382; above, p. 75.

(*r*) *Re Poole and Clarke's Contract*, 1904, 2 Ch. 173.

on the vendor any further or other right to insist on the observance of the covenants in the lease than is necessary for the purposes of his own indemnity (*s*). If the vendor of leaseholds will not remain liable, after the assignment of the leaseholds to the purchaser, for any future failure to pay the rent or keep the covenants, as where he is the original lessee's trustee in bankruptcy or is an assignee of the lease who did *not* covenant to indemnify his assignor generally against the rent and covenants, he cannot require the purchaser to covenant to indemnify him (*t*). Where on a sale of leaseholds the vendor is bound to pay the rent and perform the covenants in the lease up to the proper time for completion, as is the case under an open contract (*u*), it is thought that the purchaser cannot be required to enter into such a covenant as would extend to indemnify the vendor against past breaches of covenant (*x*). And it is submitted that in such case the purchaser cannot safely enter into a covenant of indemnity in the common form, which has been hitherto usual (*y*); for this, it seems, might be held to oblige him to indemnify the vendor against past breaches of covenant (*z*): but he should insist on his liability being expressly

(*s*) *Harris* v. *Boots, &c., Ltd.*, 1904, 2 Ch. 376.

(*t*) See *Wilkins* v. *Fry*, 1 Mer. 244, 263-266; Sug. V. & P. 37, 38; 1 Dart, V. & P. 558, 5th ed.; 630, 6th ed.; 581, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 217, 4th ed. Note that the assignee's liability independent of express contract to indemnify the original lessee (as to which see *Burnett* v. *Lynch*, 5 B. & C. 589; *Moule* v. *Garrett*, L. R. 5 Ex. 132, 7 Ex. 101) extends only to omission to pay the rent or keep the covenants during his own tenancy, and not to any such omission occurring after he has assigned over: Sug. V. & P. 38.

(*u*) Above, pp. 339 *sq.*

(*x*) This is further apparent from the fact that the covenants for title, which the vendor is bound to give, include a covenant that the rent has been paid and the covenants performed; see above, p. 612.

(*y*) Davidson, Prec. Conv. vol. ii. pt. i. 419, 4th ed.; 1 Key & Elph. Prec. Conv. 541, 562, 10th ed.; Davidson's Concise Precedents, 196, 19th ed.

(*z*) See *Gooch* v. *Clutterbuck*, 1899, 2 Q. B. 148, where the covenant was not exactly in the common form: but the construction placed upon it certainly throws doubt upon the construction of the common form, which is not expressed with unmistakable accuracy. Some of the reasons given for the decision in this case appear questionable: but it may be supported on the ground that the breach of the covenant to repair was a continuing breach, and the assignee covenanting to perform the covenants as from the date of the assignment came under an immediate duty to perform the covenant to repair, and he could not discharge this duty without remedying the whole breach of the covenant. Thus his failure to remedy the continuing breach, which occurred after the assignment, made him indirectly liable to indemnify the vendor against a breach of covenant which had occurred before it.

limited to indemnity against future omission to pay the rent and keep the covenants. If, however, the purchaser bought with notice of some breach of covenant and agreed to take the property subject to the breach, then, it is thought, his covenant to indemnify the vendor ought to include indemnity against the consequences of that breach. For example, where buildings held under a repairing lease are out of repair and are sold to a purchaser, who has notice of the actual condition of the premises, on the terms that he shall take them as they are and the vendor shall not be obliged to put them in repair before completion, the purchaser must, it is submitted, covenant to indemnify the vendor against all liability for the existing breach of the covenant to repair (*a*) as well as against any future omission to pay the rent or keep the covenants (*b*).

Sale of *part* of the land comprised in a lease.

On the sale of *part* of the land comprised in a lease for years, when the rent is apportioned as between the parties but the lessor does not concur in the apportionment (*c*), each party is bound to covenant with the other to pay his apportioned part of the rent and to keep the covenants of the lease in respect of that part of the land leased, of which he will thenceforth be in possession, and to keep the other party indemnified against his failure to do so. But it is thought that, in the absence of express stipulation, neither party is bound to grant a rent-charge or give a power of entry or a charge to the other by way of indemnity against the breach of his covenants (*d*). If after

(*a*) The judgments given in *Re Highett and Bird's Contract*, 1903, 1 Ch. 287, are opposed to this view: but it is submitted that those judgments were delivered under a mistaken apprehension of the law: see above, p. 344.

(*b*) Apparently a covenant of indemnity in the common form would effect this object, where the breach is continuing, for the reason given in the previous note. But if the breach were not continuing the common form could not be relied on. Where the vendor covenants for title in the usual way, it seems impossible to construe the common form of purchaser's covenant as extending to past breaches of covenant.

(*c*) See above, pp. 76, 350-352.

(*d*) See *Paterson* v. *Long*, 6 Beav. 590; below, p. 629. It was formerly usual for the parties to grant cross powers of distress by way of indemnity. But it is thought that, since the Bills of Sale Acts, 1878 and 1882, these are no longer available; see stats. 41 & 42 Vict. c. 31, s. 6; 45 & 46 Vict. c. 43, ss. 3, 8, 9; *Re Roundwood Colliery Co.*, 1897, 1 Ch. 373, 391, 392, 395, 396, 398, 399; *Stevens* v. *Marston*, 60 L. J. Q. B. 192; *Green* v. *Marsh*, 1892, 2 K. B. 330, 335. These powers are, however, sometimes still inserted (for what they may be worth) in deeds of assignment of part of the land comprised in a lease; but this course is not recommended. At the present time cross powers of entry,

Right of contribution.

the assignment over of part of the land comprised in a lease, the assignee or the assignor should be compelled to pay the whole, or more than his due proportion, of the rent reserved by the lease, he would have a right of contribution (independently of any covenants in the deed of assignment) against the other party to recover the proportion payable by the other (*e*). The manner in which land subject to one lease is usually sold in lots, has been already noticed (*f*).

Indemnity on sale of land subject to restrictive covenants.

When freehold or copyhold land affected by restrictive covenants is sold subject to the covenants, the question of the purchaser's liability to covenant to indemnify the vendor depends on the principle above stated (*g*), the same as prevails in the case of the leaseholds. If the vendor will remain liable, after the conveyance, under any covenant or contract previously made by him, for the future omission to observe the restrictions, the purchaser must covenant to indemnify him; otherwise not. And this principle is properly applicable, whether the vendor or the purchaser seek to enforce the contract (*h*). Thus the vendor will be entitled to be indemnified where he was a party to the contract, which originally imposed the restrictions, or where he bought from one liable to observe the restrictions and covenanted with him to observe the restrictions and to indemnify him against all future breaches thereof. But if the vendor

being of equal advantage to both parties, are usually given; and it is sometimes provided that any moneys payable by either party for a breach of his covenant of indemnity shall be a charge on his part of the land leased, in the other's favour. See Davidson, Prec. Conv. vol. ii. pt. i. pp. 427-431, 4th ed.; Davidson's Concise Precedents, 201, 205, 19th ed.; 1 Key & Elph. Prec. Conv. 580-583, 4th ed.; 653-656, 10th ed.

(*e*) *Johnson* v. *Wild*, 44 Ch. D. 146, 151; as to the decision in this case, see above, p. 351.

(*f*) Above, p. 78.

(*g*) Above, pp. 624, 625.

(*h*) *Re Poole and Clarke's Contract*, 1904, 2 Ch. 173. See *Moxhay* v. *Inderwick*, 1 De G. & S. 708; *Lukey* v. *Higgs*, 1 Jur. N. S. 200, where there are *dicta* leading to the conclusion that, where land is expressly sold as being subject to restrictive covenants, but without an express stipulation that the purchaser shall observe the covenants, the purchaser cannot enforce the specific performance of the contract without entering into a covenant with the vendor to observe the restrictions; but if specific performance be sought by the vendor, the purchaser cannot be obliged to enter into such a covenant: see Sug. V. & P. 38. But it appears that Mr. Dart's criticism of these *dicta* (1 Dart, V. & P. 559-561, 5th ed.; 631-633, 6th ed.) was correct; and that the distinction so suggested is unsound; and it is now established that the true principle is that stated in the text; *Re Poole and Clarke's Contract*, ubi sup.

were no party to the contract creating the restrictions, and acquired the land subject to the restrictions without himself contracting to observe them or to indemnify his grantor against their non-observance (*i*), there is no reason for calling upon the purchaser to indemnify him. These results follow, when land is sold subject to restrictive covenants, although the contract for sale do not expressly provide for any covenant being made by the purchaser: but the purchaser, where he can be required so to covenant, is entitled to have his own covenant to observe the restrictions limited in express terms to securing the vendor's indemnity against future breaches of the restrictive covenants (*j*). It is however common for a vendor who is selling land subject to restrictive covenants, and who will remain liable for the failure to observe them, to stipulate expressly that the purchaser shall covenant to observe the restrictions and indemnify him against any future omission to observe them; and if this be done, the purchaser must of course covenant in the terms stipulated for. But it is held that such covenants are to be construed as being given for the purpose of indemnity only (as in the case of leaseholds), and do not give to the covenantee the right to enforce the covenantor's observance of the restrictive covenants, if not required for the covenantee's indemnity (*k*). Where lands were sold subject to a covenant not to erect thereon any buildings other than those of a particular kind and also subject to "proper provisions for securing the due observance and performance" of the covenant, it was held that the vendor was entitled to have inserted in the conveyance a power of re-entry, exercisable within the period of certain existing lives and twenty-one years after, in case of any breach of the covenant, for the purpose of pulling down any buildings erected in breach of the covenant, and holding the lands until reimbursed all expenses of so doing; but was not entitled to have a term of years or a rent-charge limited to a trustee for the purpose of securing the performance of the covenant (*l*). This was so decided in consequence of the express stipulation for proper provisions for securing the performance of the covenant. Without such stipulation, a vendor selling lands subject to restrictive

(*i*) See above, p. 625.
(*j*) *Re Poole and Clarke's Contract*, 1904, 2 Ch. 173; above, p. 626.
(*k*) *Reckitt* v. *Cody*, 1920, 2 Ch. 452.
(*l*) *Expte. Ralph*, De G. 219.

covenants cannot insist on the insertion in the conveyance of any proviso for re-entry on breach of the covenant.

Indemnity on sale of land subject to a charge for which the vendor will remain liable.

So where land is sold subject to some charge, which the vendor will after conveyance remain personally liable to pay, the purchaser is bound to covenant to indemnify the vendor against all liability for its non-payment; as where a mortgagor sells the equity of redemption of the mortgaged land (*m*), or land is sold subject to a rent-charge which the vendor has, either on its original creation or on his own purchase of the land, covenanted to pay (*n*), or an estate in remainder liable to succession duty is sold (*o*).

Indemnity on sale of part of lands subject to a rent-charge.

The indemnity, which may be required when part of a block of freehold land subject to some rent-charge is sold subject thereto, usually depends on the conditions of sale. These should provide precisely and exhaustively for the indemnity intended to be given (*p*). If it be merely stipulated that the rent-charge shall be apportioned in some particular manner between the land sold and that retained by the vendor, or, where the whole block of land is sold in lots, between the various lots, it is thought that the purchaser, or each purchaser, is bound to covenant to pay his proportion of the rent-charge and to keep the vendor, or, where the whole block is sold, the purchasers of the other lots, indemnified against his failure to do so, and is entitled to receive a similar covenant from the vendor or the

(*m*) *Waring* v. *Ward*, 7 Ves. 332, 337; *Bridgman* v. *Daw*, 40 W. R. 253; Sug. V. & P. 198; 1 Dart, V. & P. 557, 5th ed.; 629, 6th ed.; 579, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 453 and n. (*d*), 4th ed. The purchaser is liable in equity to indemnify the vendor without such covenant; *Waring* v. *Ward*, ubi sup.; *Re Law Courts Chambers Co.*, 61 L. T. 669, 671; cf. *Mills* v. *United Counties Bank, Ltd.*, 1912, 1 Ch. 231.

(*n*) 1 Dart, V. & P. 559, 5th ed.; 631, 6th ed.; 582, 7th ed.; see above, p. 417.

(*o*) *Re Repington*, 1904, 1 Ch. 811, 814; Dart, V. & P. 557, 593, 5th ed.; 629, 668, 6th ed.; 580, 1234, 7th ed.; see above, p. 392.

(*p*) See above, pp. 76-78. Where freeholds subject to a rent-charge are sold in lots and it is intended that the rent-charge shall be paid by the purchaser or purchasers of some particular lot or lots and a new rent-charge created to issue out of such lot or lots by way of indemnity, care must be taken that the amount of such new rent-charge shall be sufficient to provide for the recovery, not only of the amount of the original rent-charge, if not duly paid, but also of any expenses incurred by the purchasers of the other lots in consequence of the original rent-charge not being duly paid; see below, Appendix (A), Special Condition 5.

purchasers of the other lots, as the case may be; but that he is not entitled to require the creation of any new rent-charge to indemnify him against the failure of the vendor, or the other purchasers, to pay his or their proportion of the charge (*q*). In such case any purchaser paying any arrears or instalment exceeding his own proportion of the rent-charge would have a right of contribution (independently of any remedy under express covenant) against the owner or owners of the other part of the land subject to the rent-charge, there being a common liability on their part personally to pay the rent-charge (*r*). If the conditions of sale provide (without further words) that the rent-charge shall be *charged* on some particular lot or lots only, then the purchasers of the other lots must take them subject to the rent-charge, but will be entitled to have a new rent-charge created for their indemnity to issue out of the lot or lots to be so charged (*s*).

Right of contribution.

Where land is sold in consideration of a rent-charge to issue thereout either for life or in fee, the vendor is entitled to require that the rent shall be secured to him, not only by charging the same on the land sold, but also by the purchaser's personal covenant for payment (*t*). The vendor is also entitled to have an express power of distress limited to him, that being of the essence of a rent-charge (*u*). It is questionable, however, whether he is entitled, in the absence of express stipulation, to have the rent-charge further secured by a power in default of payment to re-enter and hold the land until the arrears of the rent and all costs be satisfied (*x*): although it has long been usual, on conveyance of land in consideration of a rent-charge, to reserve such a power (*y*). But a stipulation that the rent-charge should be secured by "proper provisions" would certainly entitle the vendor to have the same secured by such a

Sale in consideration of a rent-charge.

(*q*) The case appears to be similar to that of the purchaser of part of the land comprised in a lease; see above, p. 627.

(*r*) *Christie* v. *Barker*, 53 L. J. Q. B. 537, 542; see above, p. 417, and also p. 351.

(*s*) See *Casamajor* v. *Strode*, 2 Swanst. 347.

(*t*) *Bower* v. *Cooper*, 2 Hare, 408; 1 Dart, V. & P. 562, 5th ed.; 634, 6th ed.; 585, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 509, n., 4th ed.

(*u*) See Wms. Real Prop. 468, 470, 471, 23rd ed. This is none the less so that a remedy by distress was given for rent seck by stat. 4 Geo. II. c. 28, s. 5.

(*x*) See *Expte. Ralph*, De G. 219.

(*y*) Davidson, Prec. Conv. vol. ii. pt. i. 508 and n., 4th ed.; Wms. Real Prop. 337, 13th ed.; 471, 23rd ed.

right of entry (*z*). The vendor is not entitled, without express stipulation, to have reserved to him a power in default of payment of the rent to limit a term to a trustee on trust to raise the arrears by sale or otherwise (*a*). And if no such express stipulation were made in the contract of sale, and the remedies for recovering the rent-charge are to be reserved, as is now usual, by tacit incorporation in the conveyance of the 44th section of the Conveyancing Act, 1881 (*b*), the purchaser should be careful to insert a proviso modifying the operation of that enactment in accordance with his rights under the contract, and excluding the power to limit a term, which the statute would otherwise confer (*c*). The vendor is not entitled, in the absence of express stipulation, to have a power limited to him in default of payment of the rent to re-enter on the land and hold the same as his own.

Sale partly in consideration of an agreement by the purchaser to build.

Where land is sold partly in consideration of an agreement by the purchaser to erect buildings thereon, it is thought that, unless the contract otherwise provide, the vendor is only entitled to have the purchaser's covenant to erect the buildings (*d*). It is therefore desirable for the vendor to insert in such a contract an express stipulation that he shall, in default of due performance of the covenant, have a power of re-entry and holding the land until the covenant be performed, such power to be exercisable within a period not exceeding the limits of the rule against perpetuities; and it is sometimes advisable to make such a stipulation where it is agreed that the purchaser shall observe restrictions on the use of the land sold (*e*). But it seems that a stipulation that the performance of the covenants shall be secured "by proper provisions" will entitle the vendor to have such a power of re-entry reserved to him (*f*).

(*z*) *Expte. Ralph,* De G. 219.

(*a*) See *Expte. Ralph,* De G. 219; Davidson's Concise Precedents, 217, 218, n. (*c*), 19th ed.

(*b*) Stat. 44 & 45 Vict. c. 41; see Wms. Real Prop. 471, 472, 23rd ed.; Wms. Conv. Stat. 216, 217.

(*c*) Davidson's Concise Precedents, 217, 218, n. (*c*), 19th ed.

(*d*) See above, pp. 608, 624.

(*e*) It is not equally necessary in all cases, as the burden of restrictive covenants will in equity run with the land, and they may be enforced by action for injunction against any one acquiring the land with notice thereof; while covenants to build are only enforceable by action at law on the covenant against the covenantor personally and his representatives in law; see above, pp. 467 *sq.*

(*f*) See *Expte. Ralph,* De G. 219.

Whether the usual remedies for securing a rent-charge in fee are void for remoteness.

An express power of distress granted either in terms or by the operation of the 44th section of the Conveyancing Act, 1881 (*g*), is certainly not obnoxious to the rule against perpetuities. Such a power is, as we have seen, of the essence of a rent-charge; it merely confers by express grant the same remedy as is annexed to rent service at common law and now by statute to rent seck (*h*); it creates no separate future interest in the land apart from the rent; and it has been known to the law and always treated as unquestionably valid from Littleton's time (*i*) onward (*k*). It is submitted that the better opinion is that a right reserved on the creation of a rent-charge in fee for the owner of the rent, his heirs and assigns, to enter on the land charged in default of payment of the rent at any time, and to hold the same until the arrears of the rent and all expenses shall be satisfied out of the rents and profits, is not void at common law for remoteness, although its exercise be not confined to the duration of existing lives and twenty-one years after; and that this is the case whether such right of re-entry be created by direct reservation or by means of the Statute of Uses. For it has always been considered that such a power of entry, being given by way of remedy only for recovery of the rent, is merely a part of the estate which the grantee of the rent has in the rent limited to him; the power (when conferred) passes, as incident to the rent, by a grant of the rent to an assignee; whereas if it had been an independent interest or condition it would have been inalienable at common law, and the heir alone and no assign of the grantee could have made use of it (*l*); and this power gives only a right of seizure and temporary occupation, which does not divest the estate of the terre-tenant (*m*), and confers no more than an interest to take

Power of re-entry to satisfy arrears.

(*g*) Stat. 44 & 45 Vict. c. 41.
(*h*) Above, p. 631, n. (*u*).
(*i*) Litt. ss. 216-218.
(*k*) The author is not aware that its validity has ever been attacked: but in view of the modern extension of the rule against perpetuities, and the alarm inspired thereby amongst the weaker brethren, he has thought it worth while to state the reasons for maintaining the validity of such a power.
(*l*) *Havergill* v. *Hare*, Cro. Jac. 510; see Wms. Real Prop. 368, 398, 560, 23rd ed.; Sug. Pow. 43, 44.
(*m*) The rent-owner entering under such a power may indeed demise the land, but can only confer on the tenant an interest co-extensive with his own, that is to say, determinable on payment or satisfaction of all arrears: see Litt. s. 327; *Havergill* v. *Hare*, Cro. Jac. 510; *Jemmot* v. *Cooly*, 1 Lev. 170.

the profits in the nature of a distress (*n*). The right created by such a power appears, therefore, not to be an interest, independent of the rent, to arise at a future time in the land out of which the rent issues, and so not to fall within the class of future interests in land which must conform with the rule against perpetuities (*o*). And it is submitted that there was no occasion, before the passing of the Conveyancing Act, 1911 (*p*), on conferring such a power of entry in connexion with the creation of a rent-charge in fee, to confine the possible exercise thereof within the term of some existing lives and twenty-one years after (*q*). There appears to be no doubt, however, that a power given to the owner of a rent-charge in fee, in case of non-payment of the rent-charge at any time, to limit an *absolute* term of years to a trustee on trust to raise the arrears by sale or mortgage thereof, was invalid at common law; for the creation of such a term would confer an interest in the land charged, which would not be determinable on payment or satisfaction of the arrears of the rent (*r*); and such a future interest, capable of existing independently of the rent must, it is thought, have been limited to arise within the time allowed by the rule against perpetuities or it would be void (*s*). If, therefore, use were made of the 44th section of the Conveyancing Act, 1881 (*t*), on the creation of a rent-charge in fee, it is thought that it was formerly necessary to confine the possible

Power to limit a term.

(*n*) Co. Litt. 203 a.

(*o*) See Third Report of Real Property Commissioners, 37; Sug. Gilb. Uses, 178, 179; Lewis on Perpetuities, 618; Gray, Rule against Perpetuities (Boston, 1886), § 303, p. 287, 3rd ed.; and observe that the practice sanctioned by the most eminent conveyancers was to limit such powers of entry as security for the payment of a rent-charge in fee without confining the time of their possible exercise within the period allowed by the rule against perpetuities and without expressing any doubt as to their validity: Davidson, Prec. Conv. vol. ii. pt. i. 508 and n., 4th ed.; Wms. Real Prop. 337, 13th ed.; 1 Key & Elph. Prec. Conv. 335, n., 603, 4th ed.; Davidson's Concise Precedents, 216, 217, 19th ed.

(*p*) Stat. 1 & 2 Geo. V. c. 37, s. 6.

(*q*) The opposite course was recommended in 1 Key & Elph. Prec. Conv. 365, n. (*g*), 498, 634, 9th ed. It is submitted, however, that notwithstanding the case of *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540, the better opinion as to the law and proper practice is that expressed in the authorities referred to in the previous note.

(*r*) See above, p. 633, n. (*m*).

(*s*) Such a power, it must be remembered, could not be conferred by any common law disposition, but could only be created under the law of shifting use or executory devise: see Wms. Real Prop. 409 *sq.*, 23rd ed.

(*t*) Stat. 44 & 45 Vict. c. 41, which, it is thought, conferred no greater power of limiting a term than the landowner had without it.

exercise of the power of limiting a term therein mentioned (if this power were not altogether excluded (*u*)) to the period of the duration of some existing lives or life and twenty-one years after.

Conveyancing Act, 1911, s. 6.

On these points, however, the law has been modified by sect. 6 of the Conveyancing Act, 1911 (*x*), whereby, for removing doubts, it is declared that the rule of law relating to perpetuities does not apply to any powers or remedies conferred by sect. 44 of the Act of 1881, nor to the same or the like powers or remedies conferred by any instrument for recovering or compelling the payment of any annual sum within the meaning of that section. And the powers and remedies conferred by the last mentioned section are to be exercisable whether the annual sum is created under a power contained in an instrument coming into operation before or after the commencement of the Act of 1881, and are to take effect unless the instrument creating the power or under which the annual sum is created otherwise directs (*y*). Section 6 of the Act of 1911 applies to powers and remedies conferred by or implied in an instrument executed before as well as after the commencement of that Act (*z*). This enactment not only removes all doubts (*a*) as to the validity of the usual powers of distress and entry for the recovery of a rent-charge granted in fee or for any less estate, whether such powers were created under sect. 44 of the Act of 1881 or by express limitation, and whether before or after the Act of 1911; but it alters the law in providing that a power created in the same circumstances to limit an absolute term of years, on trust by sale or mortgage thereof to raise the arrears of such a rent-charge, is to be exempt from the rule against perpetuities (*b*). And this alteration of the law is applied not only to such powers to be thereafter created, but also to any

(*u*) Above, p. 632.
(*x*) Stat. 1 & 2 Geo. V. c. 37, s. 6 (1).
(*y*) Sect. 6 (2). This enactment apparently relates only to rent-charges created under powers (as jointure rent-charges usually are). Its effect seems to be to authorize the creation, in exercise of the power, of all the remedies given by sect. 44 of the Act of 1881 or similar express remedies, and to give validity to all such remedies, when so created. When read together with the rest of sect. 6 of the Act of 1911, its effect seems to be retrospective, and to give validity to all such remedies previously created in exercise of some power.
(*z*) 1st Jan. 1912; sect. 16 (2).
(*a*) See above, pp. 418, 633, 634.
(*b*) See above, p. 634.

such powers already so created in the past. It is no longer necessary, therefore, on limiting a rent-charge in fee, to confine the exercise of a power to limit an absolute term of years (*c*), on trust as aforesaid (whether granted by virtue of sect. 44 of the Act of 1881 or by express limitation) to some period allowed by the rule against perpetuities (*d*). But it does not appear that this alteration of the law entitles a person, who contracts for the grant to himself of a rent-charge, to require that he shall have the power to limit an absolute term, on trust as aforesaid (*d*), as a remedy, unless he expressly stipulate therefor (*e*).

Power of re-entry by way of forfeiture.

With regard to the limitation, on the conveyance of land in consideration of a rent-charge in fee to issue thereout, of a power for the grantee of the rent, his heirs and assigns to enter in case of non-payment of the rent at any time and thenceforth to hold the land charged in fee as his or their own, if such a power is reserved by way of shifting use, as it must be to enable the grantee's assigns to take advantage of it (*f*), it will be void unless limited to the time allowed by the rule against perpetuities (*g*). And so will a like power of entry limited by way of shifting use to arise on breach of covenant (*h*). In either case the power is quite different from a power annexed to a rent to enter and satisfy arrears; for a power to enter and hold the land absolutely defeats altogether the estate given subject to the power (*i*), the event in which the power is to be exercisable being a cause of forfeiture of that estate. As to conditions of entry limited on gifts of land at common law to the donor and his heirs, they were in use and were considered to be perfectly valid long before the rule against perpetuities was heard of (*k*), and the opinion of the Real Property Commissioners was that, although these conditions came within the *policy* of the modern rule against perpetuities, their validity

Common law conditions of re-entry.

(*c*) And of course not the usual powers of distress and entry; above, pp. 633, 634.
(*d*) See above, pp. 634, 635.
(*e*) See above, p. 632.
(*f*) See Litt. ss. 325, 347, 348; Co. Litt. 201, 214, 215; Butler's notes to Co. Litt. 203 a, b; above, p. 633, and n. (*l*).
(*g*) Third Rep. of Real Prop. Commrs. 37; *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540, 549.
(*h*) Above, p. 633.
(*i*) See above, p. 634.
(*k*) Litt. s. 325; Co. Litt. 201, 202.

was not affected by that rule, as it then existed (*l*). In the later years of the last century, however, the opinion was judicially expressed that a common law condition of re-entry annexed to a grant of land in fee is invalid unless the event, in which the power of entry is to arise, must occur within the time allowed by the rule against perpetuities (*m*). If,

(*l*) See their Third Report, pp. 29, 36, 37. Their opinion was, and it was long considered by very eminent lawyers, that the rule against perpetuities related only to future interests created by way of shifting use or executory devise: see Wms. Real Prop. 276, 277, 319 *sq.*, 13th ed.; Davidson, Prec. Conv. vol. iii. pt. i. 336, 3rd ed.

(*m*) North, J., *Dunn* v. *Flood*, 25 Ch. D. 629; Baggallay, L. J., *S. C.*, 28 Ch. D. 592; *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540. In the former case the opinions expressed were *obiter dicta;* and according to the report the power of entry was created by covenant only and in favour of the vendors, without mentioning their heirs and assigns. If this be correct there could have been no objection on the score of perpetuity; for the power of entry would only have been exercisable by the vendors themselves in their lifetime. In the latter case the point was not precisely determined. It was a vendor and purchaser summons raising the question whether it was an objection to title that the land sold was subject to a common law condition of reverter to a former owner's heir in an event which might occur at an unlimited time after the creation of the condition. Byrne, J., expressed the opinion that the condition was void, but decided that the title was too doubtful to be forced on an unwilling purchaser, since the person who would be entitled under the condition (which if valid would have come into effect on the conveyance completing the sale) was no party to the proceedings and threatened litigation against the purchaser. The learned judge must therefore have considered that it was reasonably open to doubt whether the person entitled in case of the validity of the condition had not a good cause of action. It should be noted that the opinion of the Real Property Commissioners (3rd Rep. p. 37) was not cited in either of these cases. Byrne, J., in the latter case, admitted that there was no authority on the point and simply adopted the view maintained in Lewis on Perpetuities, 616, saying that, except in Challis on Real Property, 174-177, 2nd ed., he could find no definite statement of a contrary opinion. It is submitted that on such a question the opinion of the Real Property Commissioners is of greater weight than that of Mr. Lewis. But of course, as Mr. Justice Byrne well pointed out, instancing the analogous progress of the law as to contracts in restraint of trade, the boundaries of the rule against perpetuities have been of late considerably extended, and several interests which formerly were only within the *policy* of the rule have been drawn definitely within the ambit of the rule itself: see *London and South Western Rail. Co.* v. *Gomm*, 20 Ch. D 562; *Re Frost*, 43 Ch. D. 246; Wms. Real Prop. 437-453, 23rd ed. If, however, covenants for the perpetual renewal of leases are to be considered as outside the rule because their validity was established before the modern development of the perpetuity rule (and it is submitted that their exception cannot be well founded on any other principle: see an article by the writer in 42 Sol. J. 628), surely common law conditions, which are of much greater antiquity, might be allowed a similar immunity. One very strong argument in favour of the validity of common law conditions of re-entry, though unrestricted as to time, is that by the common law, if an estate be given to a man and his heirs upon some condition subsequent, a right of re-entry on breach of the

then, on sale of land in consideration of a rent-charge and a covenant to build or to observe restrictive covenants, the vendor stipulate for the reservation of a right of re-entry by way of forfeiture on non-payment of the rent or breach of covenant, such right of entry must, if it is to be extended to the vendor's assigns, be created by way of shifting use and must therefore be limited to arise within some lives or life in being and twenty-one years after (*n*). And in the present state of the law it would be unwise to create a common law condition of re-entry without limiting the time of its possible exercise in the same way. And it is thought that this is equally the case where land is sold partly in consideration of the performance of building or restrictive covenants and it is stipulated that the performance of the covenants shall be secured by a power of re-entry and holding till performance of the covenants (*o*). In this case also it appears that a right for the vendor's assigns to re-enter can only be secured by a shifting use (*p*); and as the right to enforce a building covenant can confer no interest in the land to be built on, and the right to enforce a restrictive covenant is merely an equitable interest in the land thereby affected (*q*), it does not appear to be maintainable that a right of re-entry of this kind is a part of the estate of the person entitled to enforce the covenant; which is, as we have seen (*r*), the ground on which a like power of entry annexed to a rent is asserted to be valid, though unlimited as to time.

Power on breach of covenant to enter and hold until performance thereof.

condition is *implied* in favour of the donor and his heirs; Litt. ss. 328, 329, 331. It does not appear that the law has been altered in this respect. But if common law conditions should be subject to the rule against perpetuities, it would apparently follow that such an implied condition of re-entry would be void, as being exercisable at *any* future time. In *Re Costa*, 1912, 1 Ch. 337, Eve, J., purported to follow the decision of Byrne, J., in *Re Hollis' Hospital and Hague:* but it is respectfully submitted that the gift over in *Re Costa* was not (as Eve, J., described it) "a true common law condition subsequent"; for it was a gift over to a stranger and not a condition of re-entry to the grantor or his heirs; see Litt. ss. 347, 723; Co. Litt. 214, 379. It was, therefore, a gift which could only take effect by way of shifting use or executory devise; and as such it was undoubtedly subject to the rule against perpetuities.

(*n*) Above, p. 636.

(*o*) Above, p. 633. See Davidson, Prec. Conv. vol. ii. pt. i. p. 511 and n., 4th ed.; 1 Key & Elph. Prec. Conv. 335, n., 467, 604, 4th ed.; 396, 397 and notes, 547, 548, 685, 10th ed.; Davidson's Concise Precedents, 221 and n. (*b*), 19th ed.

(*p*) See above, p. 633.

(*q*) Above, pp. 467 *sq.*

(*r*) Above, p. 633.

Delivery of the title deeds on completion.

Another matter which may be conveniently discussed in connexion with the preparation of the conveyance is the delivery to the purchaser of the title deeds or other muniments of title, and the vendor's duty to give or procure proper statutory acknowledgments of right to production and undertakings for safe custody of any documents of title lawfully retained in the possession of the vendor himself or any other person. The general rules governing this matter upon a sale by open contract have been already stated (*s*). The vendor is bound, in the absence of special stipulation, to deliver over to the purchaser on completion all documents of title, which are or should rightly be in his own possession and relate solely to the property purchased, whatever be their date and whether abstracted or not (*t*). The documents, which must be so handed over, include not only the title deeds and such other muniments of title as will pass without express mention by a conveyance of the land itself (*u*), but also all documents produced for the purpose of verifying the abstract in proof of any fact stated therein; such as certificates of baptism, marriage or burial, statutory declarations as to matters of pedigree or as to the identity of the property sold, or certificates of the result of an official search for judgments or other matters (*x*). But of course documents, such as a marriage settlement, merely produced to show that they do not affect the land sold (*y*) cannot be required to be given up to the purchaser. It appears that in general the vendor is not obliged to hand over the receipts for payments made on account of any of the death duties (*z*); for although these may be evidence (especially in the case of succession duty) that a charge of duty on the land sold has been satisfied, they are principally evidence of the discharge of the person who made the payment from a personal liability or accountability to the Crown, and on this ground he appears to be entitled to

(*s*) See above, pp. 34, 44, 45.

(*t*) Sug. V. & P. 407; Dart, V. & P. 673, 5th ed.; 762, 6th ed.; 693, 7th ed. It is thought that he is so bound, although the time of the commencement of title be limited by special contract. The rule as to what documents may be required to be included in an acknowledgment is different; see below, p. 643.

(*u*) See *Harrington* v. *Price*, 3 B. & Ad. 170; *Philips* v. *Robinson*, 4 Bing. 106; *Re Williams and Newcastle's Contract*, 1897, 2 Ch. 144, 148; Wms. Pers. Prop. 137, 17th ed.

(*x*) See above, pp. 131, 139-141, 570.

(*y*) See above, p. 124.

(*z*) See below, Chap. XXI.

retain them. But it seems that any written statement or certificate (such as may be given in the case of estate duty (*a*)) of the Inland Revenue Authorities, which merely purports to show that the land sold is discharged or free from any lien or claim for some particular death duty, ought to be delivered up to the purchaser. As we have seen (*b*), the Vendor and Purchaser Act, 1874, provides that, in the absence of stipulation to the contrary, where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents (*c*). Documents have been held to relate to land retained by a vendor, within the meaning of this enactment, where they were evidence of the grant over it of an easement, which was afterwards extinguished by unity of possession (*d*). But it has been held that, as this Act relates only to sales of *land*, this enactment only applies where the vendor retains some land or interest in land, to which the documents of title relate; so that where a mortgage had been made of land together with policies of insurance on the mortgagor's life, and the mortgagee sold the land, but not the policies, under his power of sale, it was decided that the mortgagee was bound to hand over the mortgage deed to the purchaser (*e*). This case appears to have been argued and decided solely upon the construction of the enactment quoted: but it is submitted that the matter ought rather to have been referred to the principle contended for before the Vendor and Purchaser Act was passed, namely, that where a title deed of any land sold relates also to other property of the vendor, he should be at liberty to retain it (*f*); and that the intention of the Act was merely to declare the law in cases where the vendor retained some *land* and not to legislate for cases in which he retains some personal chattels to which the deed in question is also a title deed. Suppose that land and personalty were vested in trustees by one deed of settlement, the land being settled on trust for sale, would the trustees be obliged on a sale of the land to hand over the deed of settlement to the purchaser? It is thought not. But if this opinion be right, it must rest

Re Williams and Newcastle's Contract.

(*a*) See below, Chap. XXI. § 3.
(*b*) Above, p. 44.
(*c*) Stat. 37 & 38 Vict. c. 78, s. 2, rule 5.
(*d*) *Re Lehmann and Walker's Contract*, 1906, 2 Ch. 640.
(*e*) *Re Williams and Newcastle's Contract*, 1897, 2 Ch. 144.
(*f*) 2 Dart, V. & P. 618, 4th ed.; Wms. Pers. Prop. 11, 11th ed.; 138, 17th ed.

on the above-mentioned principle; as it does not appear that the fact, that the trustees have duties to perform under the deed, is of itself sufficient to justify their retaining it. For where land alone is settled on trust for sale and the trusts of the purchase-money are declared by the same deed, it is considered that the trustees are not entitled to retain the deed of settlement on a sale of all the land (*g*); and for this reason it is the practice to declare the trusts of the purchase-money by a deed separate from the conveyance on trust for sale (*h*). But in any case where land has been settled along with personal chattels by the same deed either upon trust for or with power of sale, and in any other case in which some title deed of land sold relates also to personal chattels retained by the vendor, he should be careful, so long as the decision in *Re Williams and Newcastle* is not overruled, to stipulate expressly that he shall retain it. It does not appear that a vendor, who is not retaining any land to which the title deeds relate, is entitled to retain them on the ground that he has entered into a covenant to produce them: but in such case, as the vendor will remain under a personal liability, the purchaser must covenant to perform the obligations which were so undertaken by the vendor and to indemnify him against their non-performance (*i*). If the vendor should prior to the sale have given a statutory acknowledgment and undertaking with regard to any document of title, that is of course no reason for retaining it; as the acknowledgment imposes no personal liability and the undertaking imposes no liability on the undertaker after he has parted with the possession or control of the document (*k*). The vendor is of course not bound to obtain and hand over any documents of title lawfully remaining in the possession of any other person than himself; as where he himself has no more than a right to their production under a statutory acknowledgment or a covenant, or where the documents are in the possession of a mortgagee of other land, or a mortgagee who is not to be paid off.

Vendor, who has covenanted to produce the deeds.

Vendor who has given a statutory acknowledgment and undertaking.

(*g*) 2 Dart, V. & P. 675, 5th ed.; 763, 6th ed.; 694, 7th ed.

(*h*) Davidson, Prec. Conv. vol. iii. 59, 857, 3rd ed.; Williams on Settlements, 125.

(*i*) Sug. V. & P. 434, 435; Dart, V. & P. 561, 675, 5th ed.; 633, 763, 6th ed.; 584, 694, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 664, n., 4th ed.; see above, pp. 624, 625.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 9 (2), (9).

Sale of land in lots.

Where lands held under one title are put up for sale in lots, without any special stipulation as to the custody of the title deeds, it is considered that, if all the lots be sold, the title deeds should be delivered to the purchaser of the largest part in value of the lands (whether that part be contained in one lot or several lots), and that he should give statutory acknowledgments and undertakings to the other purchasers (*l*). If and so long as any lot remain unsold, the vendor will be entitled to retain the deeds (*m*). But it is usual and proper on a sale by auction of land in lots to make special stipulations to the like effect; and these generally provide that the deeds shall, after all the lots shall have been sold, whether at the auction or afterwards, be delivered to the purchaser of the largest part in value of the lands sold (*n*).

Solicitor's lien on the deeds.

It has already been considered (*o*) how far the existence of a solicitor's lien on the title deeds may be an obstacle to their delivery to the purchaser (*o*). The vendor's solicitor can acquire no lien on the draft or engrossment of the conveyance by reason of its being handed to him for approval on behalf of or execution by the vendor; as both draft and engrossment are the property of the purchaser (having been prepared at his expense (*p*)), and must be returned to him, whether the contract be completed or rescinded (*q*).

Vendor's duty to furnish statutory acknowledgments and undertakings.

As we have seen (*r*), the vendor is, as a rule, bound to furnish the purchaser with proper statutory acknowledgments and undertakings for the production and safe custody of any title deeds or other muniments of title which may lawfully be with-

(*l*) See *Griffiths* v. *Hatchard*, 1 K. & J. 17, 18; Sug. V. & P. 34; Dart, V. & P. 144, 674, 5th ed.; 162, 762, 763, 6th ed.; 158, 693, 694, 7th ed.; 1 Davidson, Prec. Conv. 147, 589, 4th ed.

(*m*) Above, p. 640.

(*n*) 1 Davidson, Prec. Conv. 621, 638, 644, 4th ed.; Davidson's Concise Precedents, 131, 19th ed.; 1 Key & Elph. Prec. Conv. 291, 389, 10th ed.; above, p. 78. Note that if it be stipulated that the purchaser of the *largest lot* shall have the deeds, the purchaser of the lot largest in area will be entitled to them: *Griffiths* v. *Hatchard*, 1 K. & J. 17; and under a condition giving the custody of the deeds to the purchaser of the largest *lot* in value, they will go to the purchaser of the one lot which has fetched the highest price, not to the purchaser of other lots, which have together realised a larger sum: *Scott* v. *Jackman*, 21 Beav. 110.

(*o*) Above, p. 117.

(*p*) Above, p. 43.

(*q*) *Oxenham* v. *Esdaile*, 2 Y. & J. 493, 3 Y. & J. 262.

(*r*) Above, pp. 34, 44, 45.

held from the purchaser on completion, and are necessary to make a good title according to the contract. This rule, it will be observed, does not oblige the vendor to furnish any acknowledgment or undertaking with regard to any document of title dated prior to the time fixed by law or agreed upon for the commencement of title. The rule is, moreover, subject to two important exceptions. First, it does not apply to documents in public or official custody or other documents, not being in the vendor's possession or power, of which the purchaser can always obtain good evidence for himself (*s*). It does not therefore apply to deeds of bargain and sale enrolled, or to copies of court roll not remaining in the vendor's possession or power: but where the vendor retains any copies of court roll forming part of the abstracted title, he must give an acknowledgment and undertaking with regard to them (*t*). It is strange that it is not settled whether the probate of a will or letters of administration forming part of the title should be included in an acknowledgment for production (*u*). Of course an unproved will of realty only (*x*) should; for that remains in private custody. And it seems that, on a sale of leaseholds, the probate of a will or letters of administration forming part of the title, should, if retained by the vendor, be included in the acknowledgment; as the probate, or an exemplification thereof, and not the original will, is the only proper evidence of the will, and the letters are the proper evidence of the administrator's title (*y*). It appears, too, that whenever executors as such have taken an interest in or exercised a power over the land sold, as under the Land Transfer Act, 1897, or Lord St. Leonards' Act (*z*), the probate of the will, being the proper evidence of their appointment, ought, if retained, to be included in the acknowledgment; and this is equally true with regard to the letters of administration in the case of an administrator. And it may be contended that, since the probate of a will has been made admissible evidence of a devise of

What documents should be included in a statutory acknowledgment.

(*s*) Above, p. 45, and n. (*e*).

(*t*) *Cooper* v. *Emery*, 1 Ph. 388.

(*u*) It is submitted that, on a sale of land by the executor of a will, or by an administrator, he is entitled to retain the probate or letters of administration, which it is necessary that he should have until he has fully administered: cf. above, pp. 640, 641.

(*x*) Above, p. 147.

(*y*) Above, p. 147, n. (*g*); Taylor on Evidence, §§ 425, 1589, 9th ed.; 2 Wms. Exors. 1889, 7th ed.

(*z*) Above, pp. 209, 214.

realty (*a*), it ought always to be the subject of an acknowledgment and undertaking, where it forms part of the title and is retained. As we have seen (*b*), however, office copies of wills and letters of administration are accepted as good evidence on a sale; and office copies of wills may be put in evidence in Court to prove a devise of realty under the same conditions as the probates may (*c*). For these reasons, perhaps, it has not been the general practice to include probates or letters of administration in a covenant or an acknowledgment for production of documents of title: but it is submitted that a claim for their inclusion could not be successfully resisted (*d*). And it is not usual in practice to include in acknowledgments copies (whether attested, certified, official or otherwise) of any documents, or certificates of baptism, marriage or burial, or receipts of payment of any death duties (*d*); although, as regards office copies and receipts for succession or estate duty retained by the vendor, this seems hardly to conform with the principle laid down by the Court (*e*). Statutory declarations, which the vendor would be bound to hand over if they related solely to the land bought, should, if retained by him, be the subject of an acknowledgment. The purchaser cannot require any acknowledgment for production of a document produced merely to prove that it does not affect the property sold, unless it be in the vendor's own possession or power (*f*).

Statutory declarations.

(*a*) Above, p. 147, n. (*g*).

(*b*) Above, pp. 136, 147.

(*c*) See stat. 20 & 21 Vict. c. 77, ss. 62, 64.

(*d*) See *Cooper* v. *Emery*, 1 Ph. 388; Davidson, Prec. Conv. vol. ii. pt. i. 663, 664, n., 4th ed.; 1 Key & Elph. Prec. Conv. 457, n., 4th ed.; 537, n. (*f*), 10th ed.

(*e*) *Cooper* v. *Emery*, 1 Ph. 388. Of documents of which office copies are issued, a purchaser can of course obtain as good evidence himself, and copies of receipts for payments of death duties will be issued by the authorities to persons applying in good faith and in proper circumstances: Davidson, Prec. Conv. vol. ii. pt. i. 662, n., 4th ed. But where such office copies or receipts remain in the vendor's possession or power, on what principle can he decline to give an acknowledgment for their production? The usual practice certainly appears unjustifiable on principle in the case of receipts for succession duty or certificates of discharge of estate duty; for these are good original evidence of the discharge of a lien on the land and remain in private and not official custody. It is submitted that any official statement in writing, or certificate purporting solely to declare that the land sold together with other land is free or discharged from all claim of duty (see above, pp. 639, 640), ought certainly to be included in an acknowledgment.

(*f*) Sug. V. & P. 436; Dart, V. & P. 676, 5th ed.; 764, 6th ed.; 695, 7th ed.

Where the purchaser will have the legal right to enforce an existing covenant or acknowledgment for production.

Secondly, where any documents forming part of the title contracted for are not in the vendor's possession, but he is entitled at law to the benefit of a covenant or statutory acknowledgment for their production, and the legal right to enforce this covenant or acknowledgment will pass to the purchaser on completion, the purchaser is not entitled to demand that a fresh covenant or acknowledgment shall be procured for him from the person in possession of the documents; for that would confer upon him no better right than he will have without it: but he is entitled, if the deed of covenant or the acknowledgment by which this right is conferred may be withheld from him, to have a statutory acknowledgment for the production of that document (*g*).

How far a covenant to produce title deeds runs with the land.

Here it may be observed that the benefit of a covenant to produce title deeds will run at law with the covenantee's lands, to which the deeds relate: but it is now considered that the burden thereof does not run at law with the lands retained by the covenantor (*h*). It is thought, however, that in equity the covenantor's successors in title to the deeds (other than purchasers for value without notice of the covenant) would be affected by the duty of production; for this seems to resemble a restriction on the free use of the deeds rather than an obligation positively affirmative, such as a liability to lay out money (*i*).

Right to the production of title deeds relating to the lands of several owners.

And it appears that, where the ownership of any land held under one title is divided, whether by sale, settlement or otherwise, and the title deeds remain in the possession of the owners of a part, the owners of the rest of the land have an equitable right, independently of any covenant, to enforce production of the title deeds in order to defend their title or effect any sale or like disposition of their lands (*k*). It is

(*g*) See Sug. V. & P. 453, n.; *Gabriel* v. *Smith*, 16 Q. B. 847, 852-854, 861, where note that the vendor had only the benefit of covenants for production of the bulk of the title deeds, but that the objection made was that there were two title deeds of which he had not, and the purchaser would not have, the benefit of a covenant for production.

(*h*) See *Austerberry* v. *Oldham*, 29 Ch. D. 750, 773, 775-778, 781-784; Farwell, J., *Rogers* v. *Hosegood*, 1900, 2 Ch. 388, 394-396; 1 Davidson, Prec. Conv. lvi., 5th ed.; 1 Key & Elph. Prec. Conv. 311, n., 4th ed.

(*i*) See *Austerberry* v. *Oldham*, 29 Ch. D. 750; Sug. V. & P. 453 and n.; 2 Dart, V. & P. 775, 5th ed.

(*k*) See as to a purchaser of part, *Fain* v. *Ayers*, 2 S. & S. 533; as to joint tenants, tenants in common, and co-parceners, Sug. V. & P. 443; *Lambert* v. *Rogers*, 2 Mer. 489; *Elton* v. *Elton*, 6 Jur. N. S. 136; *Shore* v. *Collett*, G. Coop. 234 (after partition); as to remaindermen, *Lempster* v. *Pomfret*, 1 Dick. 238; *Davis* v. *Dysart*, 20 Beav. 405; and see Sug. V. & P. 442-445, 453 and n. If the title deeds come

thought, however, that this right, like any other equity, may be lost, if the deeds come to the hands of a purchaser for value who has acquired a legal interest in them in good faith without notice of the right. But the fact that the purchaser will on completion have this equitable right to production of the title deeds does not prevent him from claiming an acknowledgment for their production; he is entitled to have secured to him either the *legal* right to enforce a covenant for production or the benefit of an acknowledgment (*l*). The vendor is therefore bound to procure such covenant or acknowledgment for the purchaser, if he can; and must, it is thought, use his best endeavours to do so (*m*). But if these fail, then by the Vendor and Purchaser Act, 1874 (*n*), the inability of the vendor to furnish such covenant or acknowledgment will not be an objection to the title, if the purchaser will, on the completion of the contract, have an equitable right to the production of the documents. Where the purchaser will have neither the benefit of a good statutory acknowledgment or legal covenant for the production of the title deeds, nor any equitable right to obtain their production, it is thought that he may decline to complete the contract; unless of course the case has been duly provided for by special stipulation.

Vendor must, as a rule, give both acknowledgment and undertaking.

It is considered that in any case in which a vendor would, according to the law in force before the Conveyancing Act, 1881 (*o*), be bound to give an unqualified covenant for the

Right to the possession of title deeds relating to the land of several owners.

into the possession of one of several joint tenants, tenants in common, or co-parceners, or one of several persons entitled in severalty to different parts of the lands, to which the deeds relate, he or she is entitled at law to retain possession of them; *Foster* v. *Crabb*, 12 C. B. 136, 142, 150; Sug. V. & P. 443; and the others have only the above-mentioned equitable right to their production. But if, while the lawful custody of the deeds is outstanding (as in the case of their being in the possession of a mortgagee or a tenant for life), the title to the lands devolves upon joint tenants, tenants in common, or co-parceners, or upon persons entitled in severalty to different parts of the lands, then, on the termination of the right to custody of the deeds (as by the mortgage being paid off, or the death of the tenant for life), none of them has a better right than the others to the custody of the deeds; and if they cannot agree who shall have the custody of them, the deeds will have to be deposited in Court, and each of them will be entitled to inspect and take copies of them; *Wright* v. *Robotham*, 32 Ch. D. 106.

(*l*) See *Barclay* v. *Raine*, 1 S. & S. 449; Sug. V. & P. 452, 453, n.; *Gabriel* v. *Smith*, 16 Q. B. 847, 861.

(*m*) See *Day* v. *Singleton*, 1899, 2 Ch. 320.

(*n*) Stat. 37 & 38 Vict. c. 78, s. 2, rule 3.

(*o*) Stat. 44 & 45 Vict. c. 41.

production and safe custody of title deeds (*p*), he is now bound to give a statutory acknowledgment and undertaking for the same purposes. And if he propose to do this, he is not bound to enter into a covenant in the old form; for by that Act (*q*) an acknowledgment shall satisfy any liability to give a covenant for production and delivery of copies of any documents, and an undertaking shall satisfy any liability to give a covenant for safe custody of documents (*r*). If, therefore, a man sell land under an open contract or apparently as beneficial owner, he is bound to furnish the purchaser not only with proper statutory acknowledgments, but also with proper statutory undertakings with regard to any documents of title (except as above mentioned (*s*)) which may rightly be withheld from the purchaser. But if a man sell as trustee or as mortgagee, it is thought that he will be bound to give an acknowledgment only (*t*): although it is advisable (*u*) for trustees and mortgagees selling as such to stipulate expressly that they shall not be required to give the statutory undertaking. It should be particularly noted that only the person who *retains possession* of documents is capable of giving a proper acknowledgment for their production and undertaking for their safe custody, which will have the right statutory effect (*x*). Thus, if a mortgagor sell part of the mortgaged lands, proposing to convey the same with the concurrence of the mortgagee, who will of course retain possession of the title deeds, the mortgagee is the only person

Proper acknowledgment and undertaking can only be given by the person retaining possession of the documents.

Sale by mortgagor with mortgagee's concurrence.

(*p*) See Sug. V. & P. 452; 1 Dart, V. & P. 555, 5th ed.; 1 Davidson, Prec. Conv. 222, n. (*t*), 223, 592, 4th ed.; Wms. Conv. Stat. 97, 102.

(*q*) Sect. 9 (9), (11).

(*r*) A vendor is apparently at liberty to covenant absolutely for production and safe custody in the old form, if he will; for his *liability* is to give such a covenant, though that liability may be satisfied by his giving an acknowledgment and undertaking. But the statutory acknowledgments and undertakings are better for both parties than the covenants in use under the old practice. The giver obtains the limitation of his liability to the time during which he has possession or control of the documents; and the receiver gets the benefit of the statutory obligation running with the documents at law: see stat. 44 & 45 Vict. c. 41, s. 9 (2), (9); above, p. 645.

(*s*) Above, pp. 642-644.

(*t*) *Re Agg-Gardner*, 25 Ch. D. 600; Davidson's Concise Precedents, 31, 730, n., 19th ed.

(*u*) The reason is that, under the old practice, trustees used to covenant for safe custody: though it was considered doubtful whether they were obliged to do so; see Davidson, Prec. Conv. vol. i. 222, n. (*t*), 223, 592, 613; vol. ii. pt. i. 667, and n. (*a*), 670, 4th ed.; above, p. 69.

(*x*) See stat. 44 & 45 Vict. c. 41, s. 9; *Re Pursell and Deakin's Contract*, 1893, W. N. 152.

who can give a valid statutory acknowledgment and undertaking with respect to them, and the mortgagor cannot do so. The mortgagee does not, as a rule, object to give the acknowledgment; but it is objectionable to him to give the undertaking, which involves a personal liability. The mortgagor's liability to covenant or undertake for safe custody is therefore properly satisfied, not by his purporting to give a statutory undertaking (*y*), but by his covenanting that he will give a statutory undertaking when the documents shall come into his possession, and that in the meantime, until such undertaking shall be given, the possessor of the documents shall keep them safe, whole, uncancelled and undefaced, unless prevented from doing so by fire or other inevitable accident (*z*). And it is thought that the mortgagor is bound to give such a covenant, in the absence of stipulation to the contrary, the regular practice in this case prior to the Conveyancing Act, 1881, having been for the mortgagor to covenant both for production and safe custody of the title deeds (*a*). It would be very unreasonable in such a case for the mortgagee to refuse to give an acknowledgment, which involves him in no personal liability: but the purchaser could not, of course, compel him to do so, if he were no party to the contract (*b*). The mortgagor would, as we have seen,

(*y*) If he were to do so, that would apparently create a contract at common law fixing him with an absolute liability for the safe custody of the deeds, without the exception of fire and inevitable accident: see *Expte. Stanford,* 17 Q. B. D. 259, 271. But such an undertaking would not have the statutory effect; not even if the deeds should afterwards come into the undertaker's possession.

(*z*) This is the duty imposed by a statutory undertaking; stat. 44 & 45 Vict. c. 41, s. 9 (9).

(*a*) Davidson, Prec. Conv. vol. ii. pt. i. 318, n. (*d*), 321, n. (*c*), 4th ed.; *Re Pursell and Deakin's Contract,* 1893, W. N. 152. The mortgagor's liability is to give an absolute covenant for safe custody: but it is more beneficial to both parties that he should covenant to give an undertaking and for safe custody in the meantime: see above, p. 647, n. (*r*).

(*b*) In such cases the mortgagee is usually under no contract with the mortgagor, and can refuse to join in the conveyance except on his own terms or on being paid off altogether; see above, pp. 115, n. (*e*), 597, 598. It is submitted that the suggestion made in 1 Key & Elph. Prec. Conv. 461, n. (*e*), 7th ed., that a mortgagee not fully paid off and retaining the title deeds by virtue of his mortgage is bound to give an acknowledgment is not warranted by the authorities cited (*Yates* v. *Plumbe,* 2 Sm. & Giff. 174; 2 Dart, V. & P. 678, 5th ed.; 766, 6th ed.; 697, 7th ed.); for in that case the mortgagees were retaining the deeds, not only in right of their mortgage, but also and chiefly as owners of a larger estate of which the mortgaged lands formed part, and it was as such owners that they were held liable to covenant for production. See now 1 Key & Elph. Prec. Conv. 483, n. (*i*), 8th ed.; 520, n. (*b*), 9th ed.; 568, n. (*b*), 10th ed.

be bound to use his best endeavours to procure an acknowledgment from the mortgagee: but if the mortgagee, though willing to concur in the conveyance, should persist in refusing to give an acknowledgment, the purchaser would, it appears, be obliged to accept the title. For he would, it is thought, have an equitable right against the mortgagee, as being a party to the conveyance to him, to production of the title deeds for all proper purposes (*c*). In such case, however, the purchaser should require the vendor to covenant that he will give a proper statutory acknowledgment, as well as undertaking, with regard to the title deeds, when they shall come into his possession, and also for production and safe custody of the deeds in the meantime (*d*). Here it may be observed that a person in constructive possession of documents of title appears capable of giving an effectual acknowledgment and undertaking with regard to them; so that where title deeds remain in the possession of solicitors as bailees for safe custody only, their owner can nevertheless enter into a statutory acknowledgment and undertaking for their production and safe custody. It is not equally clear that this is the case where the documents are in the possession of solicitors who have a lien upon them for their charges: but it is submitted that a man retains possession of documents within the meaning of the 9th section of the Conveyancing Act, 1881 (*e*), where the documents are in the custody of his solicitors as bailees for him, notwithstanding that his solicitors have the usual solicitors' lien thereon for their charges. And having regard to the nature of solicitors' lien on their clients' title deeds (*f*), it certainly appears that where a vendor's solicitors, who act for him generally in the matter of the sale, have the custody of the title deeds, apparently on his behalf alone, and produce them for the purchaser's inspection and approve on the vendor's behalf of a conveyance or an agreement containing a statutory acknowledgment and undertaking by the vendor with regard to them, without insisting on or giving notice of any lien thereon, they must be taken to have waived their lien as regards the creation of the rights conferred by the acknowledgment and undertaking (*g*).

Person in constructive possession of documents.

(*c*) Above, pp. 645, 646; Davidson, Prec. Conv. vol. ii. pt. i. 321, n. (*c*). 4th ed.

(*d*) Above, p. 648.

(*e*) Stat. 44 & 45 Vict. c. 41.

(*f*) See above, pp. 107-119; Wms. Pers. Prop. 64-66, 17th ed.

(*g*) It is thought that they would be estopped by their conduct from setting up any lien thereon.

The regular practice is to take acknowledgments and undertakings from the owners of any documents retained, and not from their solicitors (*h*).

Acknowledgment, whether to be given by separate document.

According to the old practice, a covenant for production of title deeds was usually taken by a separate deed and not contained in the conveyance, unless the deeds to be included therein were recited or noticed in the conveyance (*i*). And it is thought that this practice may still be usefully followed as regards statutory acknowledgments and undertakings (*k*). Where these relate only to documents recited or noticed in the conveyance, it appears more convenient that they should be contained therein. It was always desirable under the old practice, where title deeds were retained and covenanted to be produced, to obtain an endorsement on the leading title deed of a memorandum of the covenant in order to affect all persons claiming thereunder with notice thereof (*l*): but it was considered that this could not be insisted on, if not provided for by special stipulation (*m*). There is not the same necessity for this in the case of a statutory acknowledgment and undertaking, as these are by force of the statute enforceable at law against all persons who have or may come into possession or control of the documents (*n*), whether they have or have not notice thereof. Where, however, a purchaser is obliged to rely on his equitable right to the production of any documents of title (*o*), it is very material for him to obtain, if he can, the endorsement of a memorandum of the conveyance to himself on the leading title deed withheld from him; for he might lose this right if the

Endorsement of memorandum on conveyance.

(*h*) There appears to be no doubt that a simple bailee of documents has such a possession thereof as enables him to give an effectual statutory acknowledgment and undertaking, if authorized to do so by the bailor. Whether he can do so without the bailor's authority, and whether a wrongful possessor of documents can do so, are nice questions; but the statute, in the case of an undertaking at least, certainly appears to empower one who has the lawful possession, but only a limited ownership of title deeds (such as a tenant for life), to impose a greater liability on his successors in interest than he could otherwise impose by virtue of his own interest in the deeds.

(*i*) Sug. V. & P. 450; 1 Dart, V. & P. 554, 5th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 288, n. (*h*), 319, n. (*a*), 4th ed.

(*k*) 1 Dart, V. & P. 554, 5th ed.; 626, 6th ed.; 577, 7th ed.; Davidson's Concise Precedents, 139, n. (*a*), 19th ed.; Wolstenholme's Conveyancing Acts, 49, 8th ed.

(*l*) See above, pp. 645, 646.

(*m*) Davidson, Prec. Conv. vol. i. 591; vol. ii. pt. i. 663 n., 4th ed.

(*n*) Stat. 44 & 45 Vict. c. 41, s. 9 (2), (9).

(*o*) Above, p. 646.

legal right to the documents were to come to a purchaser for value taking in good faith without notice of the equity (*p*). But it is considered that, in the absence of special stipulation, a purchaser has no right to require such an endorsement to be made (*q*).

Expenses of acknowledgment and undertaking.

By the Vendor and Purchaser Act, 1874 (*r*), such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself and all necessary parties other than the purchaser. This enactment is now applicable where statutory acknowledgments and undertakings are given instead of covenants.

Liability created by acknowledgment or undertaking.

A statutory acknowledgment only imposes the obligation defined in the Act of producing and delivering copies of the documents included therein; it does not confer any right to damages for loss or destruction of or injury to the documents, from whatever cause arising (*s*). But a statutory undertaking imposes the liability to pay damages for any breach thereof (*t*). It appears that a person entitled to the benefit of a statutory undertaking cannot obtain compensation for any depreciation of the market value of his land, which might be supposed to arise from the loss of or injury to the title deeds (*u*). But he may obtain compensation for the expense of additional documents of title, rendered necessary by such loss or injury (*x*).

Endorsement of receipt.

Since the Conveyancing Act, 1881 (*y*) took effect, it has no longer been the practice to endorse on purchase or other deeds a receipt for any purchase, mortgage or other consideration money therein expressed to have been paid and received: but

(*p*) Above, p. 646.

(*q*) Dart, V. & P. 692, 5th ed.; 783, 6th ed.; 712, 7th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 663 n., 4th ed. As to endorsement on one of the documents forming part of a common title of a memorandum giving notice of restrictive covenants or easements in favour of a purchaser of part of land held under the common title over other land comprised therein, see Conv. Act, 1911 (1 & 2 Geo. V. c. 37), s. 11; above, p. 603.

(*r*) Stat. 37 & 38 Vict. c. 78, s. 2, rule 4.

(*s*) Stat. 44 & 45 Vict. c. 41, s. 9 (4)—(6).

(*t*) Sect. 9 (9), (10); see above, p. 647, and n. (*r*).

(*u*) *Brown* v. *Sewell*, 11 Hare, 49.

(*x*) *Hornby* v. *Matcham*, 16 Sim. 325.

(*y*) Stat. 44 & 45 Vict. c. 41, s. 55, making a receipt in the body of a deed *or* indorsed thereon sufficient evidence of payment in favour of a purchaser without notice of non-payment.

the receipt clause usually inserted in the body of such deeds is treated as a sufficient acknowledgment of such payment (*z*).

Settling the conveyance.

The draft of the conveyance is prepared, as we have seen (*a*), by the purchaser's solicitors. It is then sent to the vendor's solicitors for approval on his behalf; and if there be any other necessary parties to the conveyance besides the vendor (*b*), the draft is of course forwarded to their solicitors also to be settled on their behalf. Here it may be mentioned that when an instrument of assurance drawn by one conveyancer, whether counsel or solicitor, is sent to another to be settled on behalf of some party, whom the framer of the draft did not represent, the other should of course make all such alterations as he considers necessary to safeguard the interests of his client: but he should not alter the draft further or otherwise than is necessary to effect this end. In short, his alterations should be directed to matters of substance only and not of form; and it is a grave breach of conveyancing etiquette for one practitioner to amend another's draft in any point, on which his client's interests would not really be affected if the instrument were to stand as originally drawn (*c*). When the parties are agreed as to the form of the draft, the purchaser procures it to be engrossed at his own expense (*d*).

Conveyancing etiquette as to altering drafts settled by other practitioners.

Engrossment.

Stamps on conveyance.

The deed of conveyance must of course be duly stamped according to the *ad valorem* duty charged on conveyances on sale by the Stamp Act, 1891 (*e*), as amended by the Finance

(*z*) For some time prior to that Act it was the practice to indorse such a receipt; and the absence of an indorsed receipt was considered sufficient to put a purchaser upon inquiry whether the money had in fact been paid, and to entitle him to further evidence of payment. It is thought that at the present time, where a title deed dated before 1882 has a receipt for consideration money in the body thereof but not indorsed thereon, and comes from the custody in which it would naturally be if the money had been duly paid, it may, in the absence of any other fact tending to prove the contrary, be presumed that the money was paid as stated in the body of the deed. See 3 Preston on Abstracts, 15; *White* v. *Wakefield*, 7 Sim. 401, 417; *Greenslade* v. *Dare*, 20 Beav. 284, 292; *Kettlewell* v. *Watson*, 21 Ch. D. 685, 703; *Rimmer* v. *Webster*, 1902, 2 Ch. 163, 173, 174; Wms. Real Prop. 193, 194 and n. (*x*), 13th ed.; 675, 688, 23rd ed.; Wms. Conv. Stat. 228-230; above, pp. 105, 106, 108, 122, 130, 285.

(*a*) Above, p. 545. (*b*) Above, p. 577.

(*c*) See 1 Dart, V. & P. 564, 5th ed.; 637, 6th ed.; 589, 7th ed.

(*d*) Ibid. 565, 5th ed.; 638, 6th ed.; 590, 7th ed.

(*e*) See stats. 54 & 55 Vict. c. 39, ss. 14, 54-61, and First Schedule; 58 Vict. c. 16, Pt. II.; Wms. Real Prop. 675, n. (*p*), 23rd ed.; above, pp. 29, and n. (*a*), 380, n. (*n*).

(1909-10) Act, 1910 (*f*); and unless the conveyance be executed in pursuance of some contract made before the 29th of April, 1910, or be made for transferring on sale some incorporeal hereditament issuing or granted out of land, either the contract or the conveyance must bear a Particulars Delivered stamp, replacing the Increment Value Duty stamp which was imposed by the Finance (1909-10) Act, 1910 (*g*). Let us first consider the stamping of the deed with the amount of duty charged on conveyances on sale as such. This is the concern of the purchaser; the vendor is under no duty to see that it be done; and the deed may well be stamped after its execution (*h*). The vendor and his solicitor and conveyancing counsel are, however, concerned to see that all the facts and circumstances affecting the liability of the instrument of conveyance to duty, or the amount of the duty with which it is chargeable, are fully and truly set forth therein; for every person who, with intent to defraud the Crown, executes any instrument in which all such facts and circumstances are not so set forth, or being employed or concerned in or about the preparation of any instrument neglects or omits so to set forth therein all such facts and circumstances, incurs a fine of ten pounds (*i*). Under the Stamp Act, 1891, as now amended by the Act of 1910, the duty on conveyances on sale is charged at the rate of one per cent. of the amount or value of the consideration; except where the amount or value of the consideration for the sale does not exceed five hundred pounds *and* the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds five hundred pounds (*k*).

Particulars Delivered duty stamp.

Stamp duty on conveyances on sale.

(*f*) Stat. 10 Edw. VII. c. 8, s. 73.

(*g*) Stat. 10 Edw. VII. c. 8, ss. 4 (2), 41 (passed 29th April, 1910), as amended by the Finance Act, 1920 (10 & 11 Geo. V. c. 18), ss. 57, 64 (3), and Sched. IV. (passed 4th Aug. 1920). The Increment Value Duty imposed by the former Act was abolished by the latter Act, but the stamp was retained as a Particulars Delivered stamp; see below, pp. 661 *sq.*, 662, n. (*c*).

(*h*) Conveyances on sale may be stamped, without penalty, within thirty days after their first execution; or if first executed out of the United Kingdom, within thirty days after they have been first received in the United Kingdom; or if the Commissioners have been required to adjudicate upon the stamp, within fourteen days after notice of the adjudication; see stat. 54 & 55 Vict. c. 39, ss. 12, 13, 15, amended by 58 Vict. c. 16, s. 15.

(*i*) Stat. 54 & 55 Vict. c. 39, s. 5.

(*k*) Stat. 10 Edw. VII. c. 8, s. 73, doubling (save in the excepted

It is thought that, to bring a case within the terms of this exception, the statement required must be contained in the body of the instrument and not merely endorsed thereon. This is a point of great importance, and must be kept in mind in drafting conveyances on sales for five hundred pounds or less; as it appears that a deed purporting to carry out such a sale, and stamped at the rate of one-half per cent. only (*l*), may be objected to on some subsequent investigation of the title, as insufficiently stamped (*m*), unless it comply exactly with the terms of the exception. The conveyances chargeable with *ad valorem* duty under the Stamp Act, 1891, as above amended, include not only conveyances on *sale* in the strict sense of the word (*n*), but also all absolute conveyances of any property (*o*) in consideration of the transfer of stock, shares, securities or other chattels personal (*p*), or of a covenant to pay and indemnify against some mortgage or charge on the property (*q*) or to pay a debt or other sum not charged on the property, or of the release of a debt (*r*), or of the grant of a rent-charge or an annuity. That Act contains (besides sect. 59 set out above (*s*)) the following special provisions as to conveyances on sale:—

Meaning of conveyance on sale.

(Sect. 54.) For the purposes of this Act the expression "conveyance on sale" includes every instrument, and every decree or order of any Court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale (*t*) thereof is transferred to

cases) the stamp duties imposed on conveyances on sale by the Stamp Act, 1891, stat. 54 & 55 Vict. c. 39, First Schedule. These were 6*d.* for every 5*l.* or fraction thereof up to 25*l.*; 2*s.* 6*d.* for every 25*l.* or fraction thereof up to 300*l.*; and above 300*l.* 5*s.* for every 50*l.* or fraction thereof; and they are still applicable in the excepted cases.

(*l*) See previous note.

(*m*) See above, pp. 43, 119, 162.

(*n*) Above, pp. 1, 251.

(*o*) See *Great Northern Rail. Co.* v. *Inland Revenue Commrs.*, 1901, 1 K. B. 416, 417.

(*p*) *G. W. Rail. Co.* v. *Inland Revenue Commrs.*, 1894, 1 Q. B. 507; *Foster* v. *Inland Revenue Commrs.*, ibid. 516; *J. & P. Coats* v. *Inland Revenue Commrs.*, 1897, 2 Q. B. 423; *Chesterfield Brewery Co.* v. *Inland Revenue Commrs.*, 1899, 2 Q. B. 7. As to the stamp duty upon an exchange of lands, see stat. 54 & 55 Vict. c. 39, s. 73, and First Schedule.

(*q*) *Bristol* v. *Inland Revenue Commrs.*, 1901, 2 K. B. 336.

(*r*) *Huntington* v. *Inland Revenue Commrs.*, 1896, 1 Q. B. 422; *Bristol* v. *Inland Revenue Commrs.*, ubi sup.

(*s*) P. 29, n. (*a*).

(*t*) See notes (*o*), (*p*), above.

or vested in a purchaser, or any other person on his behalf or by his direction.

How *ad valorem* duty to be calculated in respect of stock and securities.

(Sect. 55 (1).) Where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security (*u*).

(2.) Where the consideration, or any part of the consideration, for a conveyance on sale consists of any security not being a marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon the security.

How consideration consisting of periodical payments to be charged.

(Sect. 56 (1).) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period not exceeding twenty years, so that the total amount to be paid can be previously ascertained, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on such total amount.

(2.) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years, or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument (*x*).

(3.) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically during any life or lives, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the amount which will or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of the instrument.

(4.) Provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing the payments, is to be charged with any duty in respect of such provision, and no separate instrument made in that case for securing the payments is to be charged with any higher duty than ten shillings.

How conveyance in consideration of a debt, &c. to be charged.

(Sect. 57.) Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole

(*u*) By sect. 6 (1) of the Stamp Act, 1891, where an instrument is chargeable with *ad valorem* duty in respect of any stock or marketable security [defined in sect. 122 (1)] the duty is to be calculated on the value, on the day of the date of the instrument, according to the average price thereof.

(*x*) See *Underground Electric Rys., &c., Ltd.* v. *Inland Revenue Commrs.*, 1905, 1 K. B. 174, 1906, A. C. 21.

or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty (*y*).

Duty on conveyance in separate parcels of property sold for one consideration.

(Sect. 58 (1).) Where property contracted to be sold for one consideration for the whole is conveyed to the purchaser in separate parts or parcels by different instruments (*z*), the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect of such distinct consideration (*a*).

On conveyance in separate parcels of property bought for one consideration by or for several persons.

(2.) Where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified.

Where there are several instruments of conveyance for completing one sale.

(3.) Where there are several instruments of conveyance for completing the purchaser's title to property sold (*b*), the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument.

Sub-sale by purchaser before conveyance.

(4.) Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser (*c*), the conveyance is to be charged with *ad valorem* duty in respect of the consideration moving from the sub-purchaser.

Conveyance in separate parcels after a sub-sale.

(5.) Where a person having contracted for the purchase of any property but not having obtained a conveyance contracts to sell the whole, or any part or parts thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration (*a*).

(*y*) See *Bristol* v. *Inland Revenue Commissioners*, 1901, 2 K. B. 336.

(*z*) See above, p. 581.

(*a*) Where, after conveyance of parts of the property to sub-purchasers for amounts which in the aggregate equal or exceed the original purchase-money, the original purchaser takes a conveyance of the residue to himself, this conveyance is not free from *ad valorem* duty, but must bear an *ad valorem* stamp on the part of the original purchase-money which, as between the residue and the parts sub-sold, ought to be apportioned to the residue: *Maples* v. *Inland Revenue Commrs.*, 1914, 3 K. B. 343.

(*b*) See above, pp. 581, 582.

(*c*) See above, pp. 580, 581.

Where sub-purchaser has taken a conveyance of the purchaser's interest.

(6.) Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving from him (*d*), and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable only with such other duty as it may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty.

As to sale of annuity or right not before in existence.

(Sect. 60.) Where upon the sale of any annuity or other right not before in existence (*e*) such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale.

Conveyance by several instruments.

(Sect. 61 (1).) In the cases hereinafter specified the principal instrument is to be ascertained in the following manner:—

Copyholds conveyed by deed.

(a) Where any copyhold or customary estate is conveyed by a deed (*f*), no surrender being necessary, the deed is to be deemed the principal instrument:

By surrender.

(b) In other cases of copyhold or customary estates (*f*), the surrender or grant, if made out of Court, or the memorandum thereof, and the copy of court roll of the surrender or grant, if made in Court, is to be deemed the principal instrument (*h*):

(c) Where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument.

(2.) In any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly.

Sale of an equitable interest in lands.

As we have seen (*i*), on the sale of any equitable interest in lands the contract for sale may be stamped with the *ad valorem* duty, and in that case the conveyance is not chargeable with any further stamp duty.

Of equity of redemption.

On the sale of an equity of redemption, as the purchaser takes upon himself the burden of the mortgage

(*d*) See above, p. 29, n. (*a*).
(*e*) See above, p. 416.
(*f*) Above, pp. 221, 335 *sq.*
(*h*) See also sects. 65-68. No stamp duty is chargeable on an admittance. Former statutes under which duty was payable (stats. 48 Geo. III. c. 149, and 13 & 14 Vict. c. 97) were repealed by the Inland Revenue Repeal Act, 1870 (33 & 34 Vict. c. 99), and the duty was not re-imposed by the Stamp Act, 1870 (33 & 34 Vict. c. 97), or the Stamp Act, 1891; see Elton on Copyholds, 282, 339, n. (*b*), 1st ed.
(*i*) Above, p. 29, n. (*a*).

debt (*j*), the conveyance is chargeable with *ad valorem* duty, not only on the price, but also on the total amount due for principal and interest on the mortgage debt (*k*). So a conveyance of the equity of redemption by a mortgagor to a mortgagee, in consideration of the release of the mortgage debt, is chargeable as a conveyance on sale with stamp duty on the amount of the debt (*l*). And a conveyance executed by a mortgagor in pursuance of an order for foreclosure absolute, obtained by an *equitable* mortgagee and directing the mortgagor to execute a conveyance of the legal estate, has been held chargeable with stamp duty as a conveyance on sale (*m*). It was formerly supposed that an order for foreclosure absolute obtained by a legal mortgagee was not an order transferring an estate or interest in property and so chargeable with *ad valorem* stamp duty under the Stamp Act, 1891 (*n*); but in 1896 the Inland Revenue Commissioners, on the opinion of the Law Officers, claimed that *ad valorem* duty was payable (*o*), and by the Finance Act, 1898 (*p*), it was, "for the removal of doubts," declared that the definition of conveyance on sale in the Stamp Act, 1891 (*q*), should include decrees or orders for or having the effect of an order for foreclosure; and it was provided that, where *ad valorem* stamp duty is paid upon such decree or order, any conveyance following upon such decree or order shall be exempt from the *ad valorem* duty. Since this enactment was declaratory, it had a retrospective operation, and it was held that orders for foreclosure absolute obtained by a legal mortgagee before the Act of 1898 were chargeable with *ad valorem* stamp duty under the Act of 1891 (*r*). As we have seen (*s*), not only a conveyance by deed, but any instrument or order of any Court may be chargeable with stamp duty as a conveyance on sale. Vesting orders (*t*) may therefore be so chargeable; and so may Acts of

Foreclosure orders.

Vesting orders; Acts of Parliament.

(*j*) Above, p. 630.
(*k*) See sect. 57, above, p. 655, and below, n. (*m*).
(*l*) See *Bristol* v. *Inland Revenue Commrs.*, 1901, 2 K. B. 336, and next note.
(*m*) *Huntington* v. *Inland Revenue Commrs.*, 1896, 1 Q. B. 422.
(*n*) See above, p. 654.
(*o*) *Re Lovell and Collard's Contract*, 1907, 1 Ch. 249, 255.
(*p*) Stat. 61 & 62 Vict. c. 10, s. 6.
(*q*) Stat. 54 & 55 Vict. c. 39, s. 54; above, p. 654.
(*r*) *Re Lovell and Collard's Contract*, 1907, 1 Ch. 249.
(*s*) Sect. 54, above, p. 654. By sect. 122, "instrument" includes every written document.
(*t*) See above, pp. 510, 531.

Parliament (*u*). The stamp duty on conveyances on sale is chargeable on the value of all property assured by the conveyance; so that where on a sale of land the timber or fixtures is or are sold by valuation (*x*), the amount of the valuation must be stated in the conveyance (*y*). So must the value of the goodwill of a business, where separately valued and assigned by the conveyance of any land or chattels forming part of the assets of the business, and also where it is separately assigned (*z*). A conveyance of land in consideration of a rent-charge to issue thereout (*a*) is chargeable as prescribed above in the case of periodical payments (*b*); and if a lump sum be further payable immediately as part of the consideration, *ad valorem* duty is chargeable on that also. But on a sale of land subject to an existing rent-charge or any kind of rent, as rent service on the sale of leaseholds, the payment of the rent is held not to form any part of the consideration for the purposes of stamp duty, notwithstanding that the purchaser covenant to indemnify the vendor against such payment (*c*); and this is so where part of land subject to one entire rent is sold and the rent is apportioned as between the parties to the sale (*d*). By the Finance Act, 1900 (*e*), a conveyance on sale made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and in further consideration of a covenant by the purchaser to make, or of his having previously made, any substantial improvement of or addition to the property conveyed to him, or of any covenant relating to the subject-matter of the conveyance, is not chargeable, and shall be deemed not to have been chargeable, with any duty in respect of such further consideration.

Timber, fixtures,

Goodwill.

Conveyance in consideration of a rent-charge.

Covenant to improve or add to property sold.

(*u*) See *G. W. Rail. Co.* v. *Inland Revenue Commrs.*, 1894, 1 Q. B. 507. Under the Finance Act, 1895 (stat. 58 Vict. c. 16), s. 12, where after the passing thereof by virtue of any Act of Parliament, whenever passed, (a) any property is vested by way of sale in any person, or (b) any person is authorised to purchase property, then in the former case a King's printer's copy of the Act or some instrument relating to the vesting, and in the latter an instrument of conveyance, is to be stamped with the *ad valorem* duty payable upon a conveyance on sale of the property and produced to the Inland Revenue Commissioners.

(*x*) Above, p. 55.

(*y*) 2 Dart, V. & P. 697, 5th ed.; 788, 6th ed.

(*z*) See *Potter* v. *Inland Revenue Commrs.*, 10 Ex. 147; cases cited above, p. 30.

(*a*) Above, pp. 630 *sq.*

(*b*) Above, p. 655.

(*c*) Above, pp. 624, 630.

(*d*) *Swayne* v. *Inland Revenue Commrs.*, 1900, 1 Q. B. 172.

(*e*) Stat. 63 Vict. c. 7, s. 10.

So where land is conveyed in consideration of a rent-charge, and of a covenant to build thereon (*f*), or of the previous erection of buildings thereon, no stamp duty is chargeable in respect of the covenant or improvement.

Where several transactions are carried out by one instrument.

By the Stamp Act, 1891 (*g*), except where express provision to the contrary is made by this or any other Act, an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters; and an instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations. So that where a conveyance takes effect as upon sale and also as a mortgage (*h*), it is chargeable with stamp duty on each of these transactions (*i*). Where one holding land subject to any kind of incumbrance (*k*) sells the same free from incumbrances, and on completion of the sale the land is conveyed to the purchaser by one deed, in which the vendor and the incumbrancers concur to assure their respective interests (*l*), stamp duty is only chargeable as upon a conveyance on sale, notwithstanding that the incumbrancers were no parties to the contract of sale and receive no part of the consideration; for, although as between the incumbrancers and the vendor their conveyance be voluntary, yet as between the conveying parties and the purchaser, the assurance is for one valuable consideration (*m*), and is nothing more than the conveyance on sale to him of the whole estate contracted for (*n*). But if in a deed of conveyance on sale some interest is also assured, which is outside the transaction of sale, as if an estate in remainder or reversion or subject to some incumbrance were sold, and after the sale but before completion the purchaser were to induce the owner of the particular estate or incumbrance either gratuitously or for value to concur in the conveyance,

Conveyance comprising sale and mortgage.

Where incumbrances released by conveyance on sale.

Release of interests not comprised in the sale.

(*f*) Above, p. 632.
(*g*) Stat. 54 & 55 Vict. c. 39, s. 4.
(*h*) See above, pp. 587-590.
(*i*) 2 Dart, V. & P. 705, 5th ed.; 796, 6th ed.
(*k*) See above, p. 583.
(*l*) See above, p. 583.
(*m*) Above, p. 598.
(*n*) See Sug. V. & P. 570; 2 Dart, V. & P. 704, 5th ed.; 795, 6th ed.

then the deed would be chargeable with stamp duty, not only as a conveyance on sale, but also in respect of the assurance of the estate or interest not included in the sale (*o*). Where incumbrances are got in by a vendor prior to conveyance to the purchaser (*p*), the deeds of reconveyance, release or other assurance are chargeable with the stamp duty payable on such transactions under the Stamp Act, 1891 (*p*), and the duty must of course be borne by the vendor (*q*). Where any instrument is duly stamped, as for its leading and principal object, this stamp covers everything accessory to that object (*r*). The inclusion in a deed of conveyance of an acknowledgment or undertaking for production or safe custody of any of the title deeds does not therefore involve the payment of any additional stamp duty (*s*). The purchaser must bear the expense of stamping the conveyance with the amount of duty charged in respect of conveyances on sale, as such (*t*).

Incumbrances released prior to conveyance to purchaser.

Acknowledgment or undertaking included in conveyance.

Expense of stamping.

By Part I. of the Finance (1909-10) Act, 1910 (*u*), a stamp duty (*x*), called Increment Value Duty, and levied on the increment value as defined in the Act (*y*) of any land, was made

Increment Value Duty.

(*o*) See Alpe's Stamp Duties, 120, 16th ed.
(*p*) See above, p. 583.
(*q*) Above, pp. 654-657.
(*r*) *Limmer, &c. Co.* v. *Inland Revenue Commrs.*, L. R. 7 Ex. 211, 217.
(*s*) See Sug. V. & P. 571; 2 Dart, V. & P. 706, 5th ed.; 797, 6th ed.
(*t*) Above, pp. 33, 652.
(*u*) Stat. 10 Edw. VII. c. 8, s. 1, passed 29th April, 1910.
(*x*) See sect. 3 (6).
(*y*) See sect. 2 (amended by the Revenue Act, 1911 (1 Geo. V. c. 2), s. 2, and the Finance Act, 1912 (2 & 3 Geo. V. c. 8), s. 10). The Duties on Land Values imposed by the Act also included Reversion Duty (sects. 13-15; Revenue Act, 1911 (1 Geo. V. c. 2), s. 3; see above, p. 383), Undeveloped Land Duty (sects. 16-19), and Mineral Rights Duty (sects. 20-24). The valuation for the purposes of the duties was regulated by sects. 25-32. The artificial nature of the mode of valuation occasioned difficulties in practice, and the litigation which resulted defeated to a large extent the objects of the duties: especially in the *Lumsden Case*, 1914, A. C. 877, which showed that Increment Value Duty might be levied, not only on increment site value, but on the ordinary profits of a builder. Other notable cases were *In. Rev. Commrs.* v. *Herbert*, 1913, A. C. 326—"assessable site value" might be a minus quantity; *In. Rev. Commrs.* v. *Walker*, 1915, A. C. 509—as to deductions in ascertaining assessable site value; and *In. Rev. Commrs.* v. *Clay*, 1914, 3 K. B. 466, the *Plymouth Case*—as to the hypothetical price which would be realised in open market by a willing seller. The inclusion in the valuation of agricultural land of the value of unexhausted manures and tillages, and other questions as to such land were dealt with in *In. Rev. Commrs.* v. *Smyth*, 1914, 3 K. B. 406 (the *Norton Malreward Case*), and *In. Rev. Commrs.* v.

payable (subject to the exemptions therein contained (*a*)), amongst other occasions (*b*), on the occasion of any transfer on sale of the fee simple of the land or of any interest in the land (*c*), in pursuance of any contract made after the commence-

Hunter, 1914, 3 K. B. 423 (the *Chells Case*). In consequence of the judgments of Scrutton, J., in the last two cases, the valuation of agricultural land appears to have been suspended pending appeal; but the appeals stood over from time to time and were never heard. Reversion Duty was made of little importance by the decisions in the *Camden Case*, 1915, A. C. 241, and the *Ecclesiastical Commissioners' Case*, 1919, 2 K. B. 67, under which moneys expended by a lessee as a condition of obtaining the lease were reckoned as part of the value of the land at the time of the grant of the lease. The assessment of Undeveloped Land Duty was suspended in consequence of the *Norton Malreward* and *Chells' Cases*. See, as to the practical working of the duties, the Report of the Land Values Committee, appointed in 1919, 64 Sol. J. 423, 443. All the duties, except Mineral Rights Duty, were repealed by the Finance Act, 1920 (10 & 11 Geo. V. c. 18), s. 57. The forms issued under the Act gave rise to *Dyson* v. *A.-G.*, 1912, 1 Ch. 159 (on Form 4); *Barghes* v. *A.-G.*, 1912, 1 Ch. 173 (on Form 8); and *A.-G.* v. *Foran*, 1916, A. C. 128 (on Form 4, in respect of minerals).

(*a*) See sects. 7 (exempting agricultural land, as defined in sect. 41, while it had no higher value than its market value at the time for agricultural purposes only), 8 (as to small houses and properties in their owner's occupation), 9 (as to land used for games or recreation), 10 (as to Crown lands), 35 (exempting land held by rating authorities), 38 (as to land held by a statutory company for the purposes of their undertaking).

(*b*) These (see sect. 1) were (1) on the occasion of the grant, in pursuance of any contract made after the commencement of the Act, of any lease (not being a lease for a term of years not exceeding fourteen years) of the land (but see sect. 22 as to mining leases); (2) on the occasion of the death of any person dying after the commencement of the Act, where the fee simple of the land or any interest in the land was comprised in the property passing on the death of the deceased within the meaning of sects. 1 and 2, sub-sect. (1) (a), (b) and (c), and sub-sect. 3 of the Finance Act, 1894 (stat. 57 & 58 Vict. c. 30), as amended by any subsequent enactment; and (3) where the fee simple of the land or any interest in the land was held by any body corporate or by any body unincorporate as defined by sect. 12 of the Customs and Inland Revenue Act, 1885 (stat. 48 & 49 Vict. c. 51), in such a manner or on such permanent trusts that the land or interest was not liable to death duties, such periodical occasions as were provided in the Act (see sect. 6, and sect. 37 as to land held for charitable purposes).

(*c*) By sect. 41, in Part I. of the Act, unless the context otherwise requires, the expression "land" does not include any incorporeal hereditament issuing or granted out of the land; and the expression "interest" in relation to land includes any undivided share in a fee simple in possession, and includes a reversion expectant on the determination of a lease; but does not include any other interest in expectancy, or an incumbrance as defined by the Act or any fixed charge as defined by the Act, or any purely incorporeal hereditament, or any leasehold interest under a lease for a term of years not exceeding fourteen years, or any tenancy which is, or is deemed to be, subject to statutory conditions under the Land Law (Ireland) Acts; and the expression "fee simple" means the fee simple in possession not subject to any lease, but does not

ment of the Act (*d*). On any transfer on sale of the fee simple of any land or of any interest in land, Increment Value Duty was to be assessed by the Commissioners of Inland Revenue (*e*) and paid by the transferor (*f*); and the instrument by means of which the transfer was effected or agreed to be effected was not to be deemed duly stamped unless it was stamped either (1) with a stamp denoting that the Increment Value Duty had been assessed and paid, or (2) a stamp denoting that the necessary particulars had been delivered to the Commissioners and security given, where required, for payment of the duty, or (3) with a stamp denoting that no Increment Value Duty was payable on the occasion; but where an instrument was so stamped, it was, notwithstanding any objection relating to the Increment Value Duty, to be deemed to be duly stamped as respects that duty (*g*). Where any agreement for a transfer was so stamped, it was not necessary to stamp any conveyance or assignment made subsequently to and in conformity with the agreement, but the Commissioners were required, on application made to them for the purpose, to denote on the conveyance or assignment the amount of duty paid (*h*).

The Increment Value Duty stamps.

The whole of the provisions of the Finance (1909-10) Act, 1910, relating to the charging, computation, collection and recovery of Increment Value Duty were repealed by the Finance

Abolition of Increment Value Duty:

include an undivided share in a fee simple in possession. As to the general meaning of the word *land* in Acts of Parliament, see above, p. 91, n. (*u*).

(*d*) See note (*u*), p. 661, above. The grant, transfer on sale, and passing on death, of a lease of a separate tenement, flat or dwelling, being part of a building used for the purpose of separate tenements, flats or dwellings, were not occasions on which Increment Value Duty was to be collected: sect. 11. No Increment Value Duty stamp was required therefore on the grant or transfer on sale of such a lease. But it seems that, since the repeal of this section, the contract or conveyance effecting such a grant or transfer is now required to be stamped with a Particulars Delivered stamp; see above, p. 653 and n. (*g*); below, pp. 664, 665.

P. D. stamp on sale or lease of separate tenement, part of larger building.

(*e*) See sect. 96 (2).

(*f*) Sect. 4 (1). By sect. 41, the expression "the transferor" does not include any persons who join in the execution of the instrument by which the transfer is effected, or agreed to be effected, for the purpose only of conveying any estate vested in them as trustees or incumbrancers, or of acknowledging the receipt of the consideration money, or of giving consent. By the Revenue Act, 1911 (1 Geo. V. c. 2), s. 1, contracts made after 31st March, 1911, for payment of Increment Value Duty by the transferee were made void.

(*g*) Sect. 4 (3); and see above, p. 29, and n. (*a*).

(*h*) Sect. 4 (7).

Retention of delivery of particulars and the stamp.

Act, 1920 (*i*), but the obligations to deliver particulars of sales and to stamp the instruments effecting them was retained. By the unrepealed part of sect. 4 of the Act of 1910, it is the duty of the transferor, on the occasion of any transfer on sale of the fee simple of any land, or of any interest in land (*k*), to present to the Commissioners of Inland Revenue, in accordance with regulations made by them, the instrument by which the transfer is effected, or agreed to be effected, or reasonable particulars thereof; and if the transferor fails to do so, he is liable to a fine not exceeding 10*l*. (*l*). Any such instrument shall not, for the purposes of sect. 14 of the Stamp Act, 1891, and notwithstanding anything in sect. 12 of that Act (*m*), be deemed to be duly stamped unless it is stamped with a stamp denoting that all particulars have been delivered to the Commissioners (*n*). Regulations may be made by the Commissioners with respect to the mode in which any instrument is to be presented to them in order to be dealt with under the section (*o*). Where any agreement for a transfer is

Particulars Delivered stamp.

(*i*) 10 & 11 Geo. V. c. 18, ss. 57, 64 (3), and Sched. IV., repealing ss. 1-3, parts of s. 4, ss. 5-12, and ss. 25-29, as well as the sections relating to Reversion Duty and Undeveloped Land Duty of the Act of 1910.

(*k*) See the definitions in sect. 41 of the Act of 1910, stated above, p. 662, note (*c*). The definitions there mentioned are not repealed.

(*l*) Sect. 4 (2) of the Act of 1910, as varied by the Act of 1920; also requiring particulars to be delivered of leases of land for over fourteen years.

(*m*) 54 & 55 Vict. c. 39. Sect. 12 relates to adjudication of stamps, and sect. 14 to production of instruments as evidence.

Particulars Delivered stamp on leases.

(*n*) Sect. 4 (3) of the Act of 1910, as varied by the Act of 1920; also requiring this stamp to be placed on leases of land for over fourteen years or agreements therefor.

(*o*) Sect. 4 (5) as varied. By Regulation 3 of the Regulations of August, 1920, if the instrument itself be presented, the presentation should take place, if possible, after execution by the transferor. The instrument must be accompanied either by a copy, or by an abstract such (but containing the further particulars required) as is presented with an instrument lodged for adjudication under sect. 12 of the Stamp Act, 1891. The abstract should set out fully, for purposes of identification, the description of the property sold, and if the instrument contains or refers to a plan, a copy of such plan should be furnished. A full statement should be made, in so far as they affect the consideration, of any easements or reservations affecting the land, of any covenant restricting its use, and of any agreement or obligation to repair, or to pay outgoings. Any covenant or undertaking or liability to discharge any incumbrance, and any covenant or undertaking to erect buildings or to expend any sums upon the property, should be set out in sufficient abstract. The official form of application for a "Particulars Delivered" stamp, duly filled up and signed, should also be lodged. The official form of abstract can be used, if desired. By Regulation 4, the instrument, the abstract and the form of application, when presented, will be

stamped in accordance with sect. 4, it is not necessary to stamp any conveyance or assignment made subsequently to and in conformity with the agreement (*p*). But if desired, a corresponding stamp will be impressed on the conveyance or assignment; and a duplicate of any instrument which has been stamped in accordance with sect. 4 will be impressed with a corresponding stamp on both documents being produced to the Commissioners for that purpose (*q*). If an agreement for a transfer is intended to be followed shortly by an actual conveyance, the Commissioners will not require the agreement, or particulars thereof, to be presented under the regulations, but will accept the presentation in due course of the actual conveyance, or particulars thereof, as a compliance with the provisions of the Act (*q*).

"Particulars delivered" stamp.

It appears from the present form of sect. 4 of the Finance (1909-10) Act, 1910, and the regulations that, after a sale of the fee simple or any interest in land as defined in the Act (*r*), either the contract or the conveyance must be stamped with the "Particulars Delivered" stamp. The vendor is bound to present to the Commissioners either the contract or the conveyance (accompanied in each case with the further information required) or else reasonable particulars thereof in the required form (*s*). But it lies in his option which of these alternatives he will select. The most convenient course for him to choose seems to be to present the required particulars, instead of parting with the possession of the contract or the engrossment of the conveyance; as this will enable him to tender to the

The vendor's duty in this respect.

retained by the proper officer of the Commissioners for examination, a ticket being given by way of receipt to the person presenting them. By Regulation 5, assuming that the various documents or papers are found on examination to contain the particulars necessary, the instrument will be impressed with the "Particulars Delivered" stamp, and will be returned on presentation of the ticket after the expiration of the time mentioned therein. By Regulation 10, if the instrument itself be not presented by the transferor, reasonable particulars thereof, in the form of the various documents mentioned in Regulation 3, must be furnished by him; and a receipt will be given therefor. The form of application duly filled up should be lodged by the transferor at the same time. And by Regulation 11, provided the necessary particulars, as above, have been furnished by the transferor, the appropriate stamp will be impressed at any future date, if the instrument and the receipt for the particulars are lodged for the requisite length of time at the Head Office.

(*p*) Sect. 4 (7) as varied.

(*q*) Commissioners' Regulations, No. 7.

(*r*) See above, p. 662, n. (*c*).

(*s*) Above, p. 664, and n. (*o*).

purchaser at the time for completion the conveyance executed by all necessary parties, together with the official receipt for the particulars presented (*s*). If he do this, it appears that he will have discharged his duty to the purchaser under the contract, and it will be the purchaser's concern to see that the contract or the conveyance be duly impressed with the "Particulars Delivered" stamp (*t*). It appears that in the ordinary case of a contract of sale of land to be followed by a conveyance, either the contract or the conveyance alone may be stamped with the "Particulars Delivered" stamp, or the contract may be so stamped and the conveyance may be stamped with a corresponding stamp (*u*). For the purchaser, the most convenient course will usually be to have the conveyance alone stamped with the "Particulars Delivered" stamp; since it is generally desired, as we have seen (*x*), to avoid all reference on the face of conveyances to any written contract which preceded them. If, however, the contract should contain any stipulation giving rise to some obligation which will not be discharged by conveyance and payment of the price (*y*)—for example, an express stipulation providing for compensation for errors of description (*z*), or a stipulation that the vendor shall build a wall on adjoining land of his own—it would seem advisable to have the contract impressed with the "Particulars Delivered" stamp; for it is at least a question whether the contract would, after the execution of the conveyance, be sufficiently stamped without it (*a*). But if this be done, the

The purchaser's concern.

Whether the contract or the conveyance should be stamped with the above stamp.

Where it seems advisable to stamp the contract.

(*s*) Above, p. 664, and n. (*o*).
(*t*) See above, pp. 653, 661.
(*u*) See above, p. 665.
(*x*) Above, p. 592.
(*y*) See below, Chap. XVIII. § 1.
(*z*) Above, p. 60.
(*a*) See stat. 10 Edw. VII. c. 8, s. 4 (3), stated above, p. 664; and note that "such instrument" refers to the instrument by means of which the transfer is effected or *agreed to be effected;* see sect. 4 (2), stated above, p. 664. Note also that the Act does not precisely say that the contract need not be stamped with the "Particulars Delivered" stamp, where the conveyance is so stamped, though it makes express provision for the converse case; above, p. 665. On the other hand, where there is a contract of sale followed by a conveyance, it appears that the Act will be satisfied if the conveyance alone be stamped with such a stamp; and Regulation 7 assumes that this is the case; above, p. 665. It is submitted that a contract for the sale of land is in its inception sufficiently stamped, if stamped as required by the Stamp Act, 1891; above, p. 29, and n. (*a*); and further that, where the contract has not been completed by conveyance, a "Particulars Delivered" stamp is not necessary to make the contract available as evidence in any proceedings either to enforce it specifically or to recover damages for its breach. The vendor is only bound to present the required in-

conveyance should be stamped with a corresponding stamp as well, so as to avoid the necessity of producing the contract as part of the future title.

Conditions of sale as to the "Particulars Delivered" stamp.

It does not appear to be strictly necessary, on a sale by auction, to make any stipulation for the vendor's protection in respect of the "Particulars Delivered" stamp. If he present to the Commissioners the necessary particulars for assessment of the duty, and tender to the purchaser at the time for completion the conveyance executed by all necessary parties and the official receipt for the particulars presented (*b*), it is thought that the purchaser will have no right to reject such tender and to refuse payment of the price on the ground that neither the contract nor the conveyance bears the "Particulars Delivered" stamp (*c*). To avoid all misunderstanding, however, it seems advisable in ordinary cases to stipulate expressly that the vendor will, on or before delivery to him of the engrossment of the conveyance, present to the Commissioners of Inland Revenue the necessary particulars, and apply to have the conveyance stamped with the "Particulars Delivered" stamp, and the purchaser shall, on delivery to him of the official receipt for such particulars, complete the purchase as provided by the contract, and shall thereafter at his own expense procure the conveyance to be stamped with the "Particulars Delivered" stamp (*d*). If however the contract should contain some stipulation which the vendor may possibly require to enforce after completion, it would appear advisable to provide specially in the conditions of sale that the contract shall be impressed with such a stamp (*e*).

§ 4.—*Of the Adjustment of Accounts.*

If the purchase should be completed at the proper time for completion, the purchase money will be payable without interest (*f*), and the only matter in respect of which any adjust-

strument or particulars thereof on the occasion of any *transfer* on sale; above, p. 664; and this expression seems to point to the conveyance completing the contract. And it appears that in general an Increment Value Duty stamp was only required for instruments evidencing some transaction, which was an occasion for the payment of such duty; see above, pp. 662, 663.

(*b*) Above, pp. 664, and n. (*o*), 665.
(*c*) See above, p. 666.
(*d*) See Appendix (A), below, General Condition 21.
(*e*) See above, p. 666; Appendix (B), Condition 11, below.
(*f*) Above, pp. 27, 43, 47, 52-54.

ment of accounts may be necessary is the apportionment of the rents or profits and the outgoings (*g*). In practice, however, it is exceptional for a sale of land to be completed at the proper time; so that an account has usually to be taken of what is chargeable against the vendor on account of rents and profits received by him since the proper time for completion and what is due to him for interest on the purchase money (*h*). Besides this, the amount of the purchase money may in some cases be diminished or increased by a valid claim for compensation on the part of either purchaser or vendor. We will consider each of these matters in turn.

Apportionment of rent on completion.

First, as to the apportionment of rent. Where the lands sold or any part of them are let, and the time for completion of the sale does not fall on some rent-day, we have seen that the vendor is either by law or express stipulation entitled to an apportioned part of the rent accrued due since the last rent-day (*i*). He cannot, however (except by express stipulation), require the purchaser to pay this apportioned part of the rent to him on completion: but he must wait until the entire rent for the current quarter, half-year, or other period, for which the rent was reserved, has become due and payable; when (if the purchase has been completed) the purchaser will be entitled to recover the entire rent from the tenant (*k*) and the vendor to exact payment of his apportioned part from the purchaser (*l*). For this reason it is not uncommonly provided in conditions of sale by auction that the purchaser shall on completion pay to the vendor the proportion due to him of the current rents and shall retain the whole amount of such rents for his own benefit (*m*). As to the outgoings, where these are apportionable between the parties and payable in advance, as rates and

Apportionment of outgoings.

(*g*) Above, pp. 46, 61, 493, 499.

(*h*) Above, p. 491.

(*i*) Above, pp. 46, 61.

(*k*) Above, p. 384.

(*l*) This is so provided by the Apportionment Act, 1870 (stat. 33 & 34 Vict. c. 35), ss. 3, 4, in the absence of express stipulation. And it is thought that the same law applies where the contract of sale contains an express stipulation for apportionment of the rents: see 1 Davidson, Prec. Conv. 666, 4th ed., where the special condition would have been unnecessary if this were not the law; and cf. *Barsht* v. *Tagg*, 1900, 1 Ch. 231, 235.

(*m*) See Appendix (A), General Condition 24, below.

taxes usually are (*n*), the vendor having paid any such outgoings before the time for completion is entitled to be recouped by the purchaser to the extent of the proportion attributable to the latter. And of apportionable outgoings, which are not payable in advance (such as ground rent or tithe rent-charge), and will become payable after the proper time for completion, it is thought that the purchaser is entitled to claim that the proportion, which ought to be borne by the vendor, shall be allowed in account and deducted from the purchase money on completion. This certainly appears to be so, where the vendor has expressly agreed to discharge or to clear the outgoings (*o*). And it is thought that upon a sale by open contract the vendor incurs the like liability to discharge the outgoings (*p*), and must equally clear off on completion his proportion of any outgoings which are apportionable by law and not payable until after the time for completion. As we have seen (*q*),

(*n*) Above, p. 499. Before the year 1910, the only taxes (other than the death duties) payable in respect of land were land tax, property or income tax and inhabited house duty; Steph. Comm. ii. 589-595, 608-610, 6th ed. These are all annual charges and, if payable pending completion of a sale of the property, in respect of which they arise, they are apportionable between the vendor and the purchaser under the usual stipulation for apportionment of the outgoings; see above, p. 499 and note (*z*). Of the Land Value Duties imposed by the Finance (1909-10) Act, 1910 (stat. 10 Edw. VII. c. 8), namely, Increment Value Duty, Reversion Duty (above, p. 383), Undeveloped Land Duty and Mineral Rights Duty, only Mineral Rights Duty now remains (above, p. 661, n. (*y*)). Mineral Rights Duty is a yearly tax on the rental value of all rights to work minerals and of all mineral wayleaves, and is payable by the proprietor of the minerals, where he is working them, and in any other case by the immediate lessor of the working lessee. As to the duty in respect of mineral wayleaves, see *Shawe Storey* v. *In. Rev. Commrs.*, 1914, 1 K. B. 87. As between such lessor and lessee, the duty is to be borne by the lessor, notwithstanding any contract to the contrary, whether made before or after the Act; see sects. 20-24, 41; Finance Act, 1912 (2 & 3 Geo. V. c. 8), s. 11. It appears that if any such duty should become payable pending completion of a sale of the land, in respect whereof it arises, it would be apportionable between the vendor and the purchaser under the usual stipulation for apportionment of the outgoings; see above, p. 499, and n. (*z*). An Excess Mineral Rights Duty of 50 per cent. was imposed by Finance (No. 2) Act, 1915 (5 & 6 Geo. V. c. 89), s. 43, in cases where the rent varied with the price of the minerals; increased to 60 per cent. by Finance Act, 1916 (6 & 7 Geo. V. c. 24), s. 46; to 80 per cent. by Finance Act, 1917 (7 & 8 Geo. V. c. 31), s. 21; decreased to 40 per cent. by Finance Act, 1919 (9 & 10 Geo. V. c. 32), s. 33; increased to 60 per cent. by Finance Act, 1920 (10 & 11 Geo. V. c. 18), s. 49; and abolished by Finance Act, 1921 (11 & 12 Geo. V. c. 32), s. 40.

Taxes on land.

Mineral Rights Duty.

Excess Mineral Rights Duty.

(*o*) See *Lawes* v. *Gibson*, L. R. 1 Eq. 135; above, pp. 61, 67, 499.

(*p*) Above, p. 46.

(*q*) Above, pp. 46, 496 *sq.*

Outgoings which are not apportionable.

where any outgoings, which are not apportionable, become charged upon the property sold before the time for completion, the vendor is bound, in the absence of stipulation to the contrary, to discharge them before completion, although they may not become payable until after completion. In such cases, if the amount of the vendor's liability be exactly ascertained before the date of actual completion, he must either discharge the outgoing himself or allow the amount to be set off against an equal part of the purchase money (*r*). If the liability be not exactly ascertained before the time for completion, as where a charge has been created under the Private Street Works Act, 1892, but no final apportionment of expenses made, then, as the vendor cannot make a good title to the property sold as being free from incumbrances while the charge continues to subsist (*s*), the purchaser may, it is thought, refuse to complete without some substantial guarantee that the vendor will duly perform his obligation in this behalf; *e.g.*, that part of the purchase money sufficient to satisfy the incumbrance shall be deposited in their joint names until the charge shall have been paid off.

Apportionment of land tax and tithe rent-charge.

Here it may be mentioned that when a part of lands rated or charged together for the purposes of land tax or tithe rent-charge is sold, the tax or rent-charge may be apportioned (*t*): but as land tax and tithe rent-charge are not incumbrances (*u*), it does not appear that it is the vendor's duty to procure this to be done; the purchaser must see to it himself after completion (*x*). So also the purchaser must see for himself after completion that the property sold is separately rated for the purposes

(*r*) *Re Bettesworth and Richer*, 37 Ch. D. 535.

(*s*) See *Stock* v. *Meakin*, 1900, 1 Ch. 683; above, p. 497.

(*t*) See stats. 42 Geo. III. c. 116, s. 35, as to land tax; 5 & 6 Vict. c. 54, s. 14; 23 & 24 Vict. c. 93, s. 11, as to tithe rent-charge.

(*u*) Above, p. 164.

(*x*) See *Re Ebsworth and Tidy*, 42 Ch. D. 23. If this were not so, special stipulations would be required on every sale of freeholds in lots: but it is not considered that these are necessary, except where the vendor represents in the particulars or agreement for sale that the lots sold are each subject to particular sums payable in respect thereof for land tax and tithe rent-charge. In this case, he would, in the absence of stipulation to the contrary, be bound to procure a legal apportionment, if the whole of the lots were rated or charged together for these purposes. See 1 Davidson, Prec. Conv. 616, 622, 689, 4th ed.; 1 Key & Elph. Prec. Conv. 366, 10th ed.

of imperial or local taxation. But when the land sold is subject to some incumbrance charged thereon and on other lands as well, such as a rent reserved out of the entirety of leaseholds sold in lots, or a rent-charge issuing out of the land sold and other land, the charge is of course, in the absence of stipulation to the contrary, an objection to the title (*y*); and if the vendor should have sold the land as being subject only to a part, proportionate to its value, of the rent or other charge, he must procure the same to be legally apportioned (*z*), or he cannot enforce the contract. In such cases, therefore, as a legal apportionment cannot generally be made by consent of the vendor and purchaser alone, it is usual for the vendor to make special stipulations exonerating him from the obligation of procuring a legal apportionment, and providing for the incidence of the charge as between the parties to the sale (*a*). Where the reversion of part of lands let on lease at one entire rent is sold, the vendor should stipulate that the purchaser will be entitled to a certain yearly rent (stating the amount) as an apportioned part of the entire rent, and that the consent of the tenant to this apportionment (*b*) shall not be required (*c*). If the vendor should represent that the land sold were let at the rent stated, without mentioning that this was only an estimated part of a larger rent intended to be apportioned, he would be bound to procure a legal apportionment of the rent; and further, if in such case the land were sold with the benefit of a condition of re-entry on breach of covenant, and this condition would be destroyed by severance of the reversion (*d*), he would not be enabled to enforce the contract for sale (*e*).

Sale of land subject to a rent attaching thereon and on other land.

Sale of reversion of part of land let at one rent.

The rules respecting the purchaser's liability to pay interest on the unpaid purchase money have been already stated. As we have seen (*f*), this obligation arises either by implication

Purchaser's liability to pay interest.

(*y*) Above, pp. 152, 164, 165, 350-352.
(*z*) Above, pp. 351, 389, n. (*d*).
(*a*) See 1 Dart, V. & P. 130, 131, 5th ed.; 147, 6th ed.; 143, 7th ed.; 1 Davidson, Prec. Conv. 544, 684 *sq.*, 699 *sq.*, 4th ed.; 1 Key & Elph. Prec. Conv. 345 and n. (*d*), 391 *sq.*, 10th ed.; above, pp. 76, 77, 351; below, Appendix (A), General Condition 17, Special Condition 8.
(*b*) See above, p. 389, n. (*d*).
(*c*) 1 Dart, V. & P. 131, 5th ed.; 147, 6th ed.; 143, 7th ed.; 1 Davidson, Prec. Conv. 546, 547, 4th ed.; above, pp. 76, 77; below, Appendix (A), General Condition 17.
(*d*) Above, p. 351.
(*e*) See *Walter* v. *Maunde*, 1 J. & W. 181.
(*f*) Above, pp. 47, 54, 61, 491.

of law or express stipulation at the time when the purchaser acquires the right to enter into possession or receipt of the rents and profits of the property sold; the principle being that enjoyment of the fruits of the contract by the purchaser ought only to be had on condition of payment of the price, and that if payment be deferred, interest should be chargeable (*g*). In this respect the provisions implied by law in an open contract are far more equitable than those of the usual express stipulation made on London sales by auction, which is grossly unfair to purchasers and frequently works great hardship (*h*). Thus, under an open contract, where the vendor is in possession, the purchaser is only liable to pay interest, if there be delay in completion, from the time when he may safely take possession, that is, when a good title has been shown (*i*); and this is the case, although a day be fixed for completion, and owing to delay attributable to the state of the title, or otherwise to the vendor, a good title is not shown until after that day (*k*). And if the purchaser be in possession at the time of the contract for sale, or actually enter into possession afterwards, but before completion, or if the property sold be of such a nature that the enjoyment thereof necessarily runs from the time of sale, as in the case of a remainder expectant on a life estate returning no rent (*l*), then interest is payable from the time when actual possession or enjoyment by the purchaser as such so commenced, that is, from the date of the contract for sale or actual entry into possession (*m*). Again, under an open contract, if there be delay in completion which is attributable to the vendor, the purchaser may, by appropriating his money to the purchase and giving to the vendor notice of such appropriation, relieve himself of the liability to pay any greater interest thereon than such, if any, as is allowed upon such appropriation. Though he cannot escape his regular liability to pay interest by making such appropriation, if there be delay in completion which is attri-

Under an open contract.

(*g*) Above, p. 47, n. (*s*).

(*h*) See above, pp. 61, 62, 68 and n. (*h*), 80.

(*i*) Above, pp. 27, 43, 47.

(*k*) *Jones* v. *Mudd*, 4 Russ. 118; above, p. 54; *Re Highett and Bird's Contract*, 1902, 2 Ch. 214, 217 (which appears to be quite right in this respect; see above, p. 344.

(*l*) Above, pp. 392, 544.

(*m*) *Expte. Manning*, 2 P. W. 410; *Fludyer* v. *Cocker*, 12 Ves. 25; *A.-G.* v. *Christchurch*, 13 Sim. 214; 2 Dart, V. & P. 629, 630, 5th ed.; 711, 6th ed.; 652, 653, 7th ed.

butable to himself (*n*). But under the usual stipulation for payment of interest in case the contract shall not be completed on the appointed day from any cause whatever, or from any cause whatever other than the wilful default of the vendor (*o*), the purchaser must pay interest at the rate agreed upon (though far exceeding the return derived from the rents and profits), if there be delay in completion arising from the state of the title, a cause which would otherwise be attributable to the vendor (*p*). And the purchaser cannot, according to the better opinion, divest himself of this liability by appropriating his money to the purchase (*q*). The ground on which the law has been so established is that the purchaser having chosen to enter into such a stringent agreement must abide by its terms, and that owing to the difficulties attendant on making out a title to land, delays so caused cannot be ascribed to the vendor's wilful default. Where the contract is to pay interest, if *from any cause whatever* the contract be not completed on the appointed day, it is considered that the purchaser cannot escape the express obligation so undertaken unless the delay be caused by the vendor's vexatious conduct, dealing in bad faith, or gross negligence (*r*). Where the purchaser has agreed to pay interest if completion be delayed *from any cause whatever other than the vendor's wilful default,* he must show that the vendor has committed some wilful default within the meaning of the clause, and must further prove that such default was the effective cause of the delay (*s*). As we have seen (*t*), the late Lord Bowen remarked upon the futility of attempting to formulate an exact definition of wilful default which would cover all cases, whilst at the same time he ascribed to each of these words a particular meaning. And his explanation of this term has

Under the stipulation usual on London sales.

Contract to pay interest except on vendor's wilful default—

(*n*) Above, p. 47.

(*o*) Above, pp. 61, 62.

(*p*) *Sherwin* v. *Shakspear,* 5 De G., M. & G. 517; *Williams* v. *Glenton,* L. R. 1 Ch. 200; *Re Mayor of London and Tubbs,* 1894, 2 Ch. 524; *Bennett* v. *Stone,* 1903, 1 Ch. 509, 516, 520, 525; *Re Bayley-Worthington and Cohen's Contract,* 1909, 1 Ch. 648, 654.

(*q*) Above, p. 62.

(*r*) Above, p. 61.

(*s*) See *Re Mayor of London and Tubbs' Contract,* 1894, 2 Ch. 524; *Bennett* v. *Stone,* 1903, 1 Ch. 509; *Re Bayley-Worthington and Cohen's Contract,* 1909, 1 Ch. 648, 664.

(*t*) Above, p. 62, and n. (*z*).

been religiously adopted in subsequent cases, but has hardly proved a satisfactory guide (*u*). The particular acts or omissions which have been held to fall within or without the expression "wilful default" have been already stated (*x*); and as we have seen, in the last of these cases four judges were equally divided in opinion upon the question, whether it is wilful default for a vendor to insist mistakenly, but in apparent honesty, upon an unreasonable contention with respect to the form of the conveyance (*y*). The further point above alluded to, that the purchaser must prove that the vendor's wilful default (where it exists) is the effective cause of the delay, is illustrated by the cases of *Re Mayor of London and Tubbs' Contract* and *Bennett* v. *Stone* already cited (*z*). In the first of these, it was considered by the whole Court that, even if there were wilful default by the vendor—as to which they differed in opinion—the purchaser could not escape liability to pay interest, if the delay were in truth caused by his own conduct in making voluntary requisitions and his inability to find the purchase money. And in the latter case, three judges out of four held that, if the vendor were in wilful default, yet the purchaser was not on that account released from his obligation to pay interest, where the real cause of the delay was his own inability to provide the purchase money.

To pay except on vendor's default.

Where a purchaser had agreed to pay interest if *from any cause whatever other than "the default" of the vendor* the sale were not completed on the day fixed, and completion was delayed on account of an objection to the title, which was not obviously apparent on the face of the title deeds and was not known to the vendor at the time of sale, Lord Bowen's explanation of the meaning of *default* (*a*) was adopted, and it was held that

(*u*) See *Re Bayley-Worthington and Cohen's Contract*, 1909, 1 Ch. 648, 657-664.

(*x*) Above, p. 62, n. (*z*).

(*y*) *Bennett* v. *Stone*, 1902, 1 Ch. 226; 1903, 1 Ch. 509. The purchaser was by the contract entitled to the benefit of certain covenants entered into with the vendors by a third party. The purchaser required that the benefit of these covenants should be expressly conveyed to him. The vendors would only agree to this with the addition of the words "so far as they are now at law or in equity entitled to assign the benefit of these covenants without thereby warranting that such covenants are now enforceable by their assigns." See above, pp. 606, 612; and cf. *Re Bayley-Worthington and Cohen's Contract*, 1909, 1 Ch. 648.

(*z*) Above, p. 62, n. (*z*).

(*a*) Above, p. 62, n. (*z*).

the purchaser was not excused from paying interest, for the vendor had not failed to do something which he ought reasonably to have done (*b*). Where the contract is that if completion be delayed from any cause whatever, "the purchaser in default" shall pay interest, he is not obliged to pay interest if there be delay arising from the state of the title or otherwise attributable to the vendor (*c*). Where there was in effect an express contract to pay interest in the case of delay in completion, unless it should arise from some other cause than the neglect or default of the purchaser, and delay was caused by the purchaser making a requisition, which on appeal to the House of Lords was held to be untenable, it was considered that the purchaser was in default in insisting on such a requisition, and must pay interest accordingly (*d*).

Purchaser in default to pay interest.

The purchaser is entitled to deduct from interest payable by him income tax (*e*) at the rate in force at the time of payment (*f*).

Deduction of Income Tax.

The various items which may be charged in account against or in favour of a vendor remaining in possession after the time when interest on the purchase money has become payable, have been stated in the preceding chapter (*g*); where we have also explained what claims may be made against the vendor for deterioration of the property sold (*h*).

Items chargeable against or for vendor.

Deterioration of the property.

The only case in which the adjustment of a claim for compensation is an act done in pursuance of the contract for sale is where an express agreement to make or allow compensation for errors of description forms part of that contract (*i*). In all other cases a party claiming compensation is really seeking, not

Compensation for errors of description.

(*b*) *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 2 Ch. 211.
(*c*) *Denning* v. *Henderson*, 1 De G. & Sm. 689; *Jones* v. *Gardiner*, 1902, 1 Ch. 191.
(*d*) *Re Bayley-Worthington and Cohen's Contract*, 1909, 1 Ch. 648.
(*e*) *Bebb* v. *Bunny*, 1 K. & J. 216, distinguished, but not doubted, in *Goslings and Sharpe* v. *Blake*, 23 Q. B. D. 324, and approved in *Re Craven's Mortgage*, 1907, 2 Ch. 448, 455-457; see *Re Janes' Settlement*, 1918, 2 Ch. 54.
(*f*) Income Tax Act, 1918 (8 & 9 Geo. V. c. 40). All Schedules Rules, r. 21 (1).
(*g*) Above, pp. 491, 493-498.
(*h*) Above, pp. 488-490.
(*i*) Above, p. 60.

to carry out the contract as it stands, but to enforce its performance with a variation. It will be convenient, however, to treat in this place of these cases as well; since any claim for compensation will usually be allowed and adjusted before completion and without litigation, if the claimant can establish a clear right to enforce specific performance of the contract with compensation. And in all cases of innocent misdescription it is essential that the claim for compensation should be made before completion, if the contract contain no express agreement to make compensation; for, except in the case of such an express agreement, the claim cannot afterwards be enforced (*k*).

Claims to compensation under an open contract.

The position of the parties to an open contract with respect to claims for compensation has been already indicated (*l*). Any misdescription of the property sold must result in a breach of the contract at law; for in such case the vendor cannot discharge his obligation of producing a property corresponding with that which he has purported to sell (*l*); and he is bound at law to produce a property answering exactly to that described in the contract, no difference between substantial and insubstantial errors being admitted (*m*). But in equity it is held that, where there is an insubstantial error innocently made in the description of the property sold, the vendor may nevertheless enforce the specific performance of the contract, giving compensation for the deficiency; and this is the case whether the deficiency be of acreage or quantity, or be of right, as in the case of a quit rent not mentioned in the particulars, or where a very small part of a property described as freehold is copyhold or leasehold (*n*). This relief, however, will only be afforded in the case of an error made in entire innocence and good faith. It will be refused if the misdescription amount to a wrongful misrepresentation (*o*). And if the mistake occurred in any point really

(*k*) Above, pp. 60, 575. (*l*) Above, p. 41.

(*m*) See *Mortlock* v. *Buller*, 10 Ves. 292, 306; *Halsey* v. *Grant*, 13 Ves. 73, 77; *Clermont* v. *Tasburgh*, 1 J. & W. 112, 120; 2 Dart, V. & P. 956, 957, 5th ed.; 1083, 1084, 6th ed.; 998, 7th ed.; above, pp. 41, 42.

(*n*) *Calcraft* v. *Roebuck*, 1 Ves. jun. 221; *Halsey* v. *Grant*, 13 Ves. 73; *Esdaile* v. *Stephenson*, 1 S. & S. 122; *Scott* v. *Hanson*, 1 R. & M. 128; *King* v. *Wilson*, 6 Beav. 124; *Powell* v. *Elliot*, L. R. 10 Ch. 424; *Shepherd* v. *Croft*, 1911, 1 Ch. 521; above, p. 164.

(*o*) *Clermont* v. *Tasburgh*, 1 J. & W. 112, 120; *Price* v. *Macaulay*, 2 De G., M. & G. 339; *Dimmock* v. *Hallett*, L. R. 2 Ch. 21, 28, 31; *Re Terry and White's Contract*, 32 Ch. D. 14, 29; and see *Shepherd* v. *Croft*, 1911, 1 Ch. 521, 531.

material to the enjoyment promised by the description in the contract, the vendor cannot oblige the purchaser to perform the contract, whether the misdescription were innocently made or not, and whether it related to the quantity or situation of the land sold, or to the vendor's tenure, estate or right (*p*). As we have seen (*q*), compensation is not payable for patent defects —those which are discoverable by an inspection of the property sold—but may well be claimed for defects which are latent and interfere with the enjoyment promised by the contract; and will not be allowed for defects, of which the purchaser had notice when he bought. It is thought that the doctrine enabling the vendor to enforce specific performance with compensation is only applicable where there is a *deficiency* in the property offered in fulfilment of the contract as compared with that described therein; and does not permit a vendor to enforce specific performance with compensation in his own favour. Thus, if a man sell for a particular price "my house and lands called Broadlands, containing 100 acres," and Broadlands contain a little less than that quantity, he may enforce specific performance with compensation: but if Broadlands contain rather more than 100 acres, it is thought that the vendor cannot oblige the purchaser to perform the contract specifically on payment of a proportionately increased price (*r*).* But where a vendor makes inadvertently and in good faith a serious error to his own disadvantage in the description of the property sold or the price to be paid for it, the Court will not compel him to perform the contract specifically at suit of the purchaser; but will leave the latter to his remedy at law, unless he elect to take without compensation what the vendor really intended to sell or to pay the price the vendor meant to ask. The Court will not, however, rescind the contract at the vendor's instance in such a case (*s*).

(*p*) See *Drewe* v. *Hanson*, 6 Ves. 675, 679; *Halsey* v. *Grant*, 13 Ves. 73, 78, 79; *Binks* v. *Rokeby*, 2 Swanst. 222, 225; *Peers* v. *Lambert*, 7 Beav. 546; Fry, Sp. Perf. 548-557, 3rd ed.; *Re Arnold*, 14 Ch. D. 270; *Jacobs* v. *Revell*, 1900, 2 Ch. 858; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258. (In the last three cases there was a condition excluding compensation.) See also *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412; *Holliwell* v. *Seacombe*, ib. 426; *Lee* v. *Rayson*, 1917, 1 Ch. 613; above, pp. 174, 175.

(*q*) Above, p. 576; *Dyer* v. *Hargrave*, 10 Ves. 505.

(*r*) See *Manser* v. *Back*, 6 Hare, 443, 447, 448; 2 Dart, V. & P. 645, 5th ed.; 729, 6th ed.; 670, 7th ed.

(*s*) See *Neap* v. *Abbott*, C. P. Coop. (1837-8), 333; *Helsham* v. *Langley*, 1 Y. & C. C. C. 175; *Manser* v. *Back*, 6 Hare, 443, 447, 448;

The purchaser's right to specific performance with compensation.

So far we have dealt with the vendor's case. The purchaser under an open contract containing a misdescription of the property sold is in a different position. For the rule is that the vendor, having represented himself to be the owner of or to be entitled to sell a particular property, is estopped from showing in avoidance of the contract that he has the right to convey a part only and not the whole of what he purported to sell (*t*). The purchaser therefore is, as a rule, entitled, if it turn out that there is a mere *deficiency*, whether of area, estate or right, and whether substantial or not, between the property described in the contract and that offered in fulfilment thereof, to enforce the specific performance of the contract, taking such interest in the property sold as the vendor has and receiving compensation for the deficiency. For example, where a vendor described the land sold as containing a much greater quantity than its actual area (*u*); where a vendor could make no title to a considerable part of the land sold (*x*); and where a vendor who purported to sell the fee simple of certain land was entitled as tenant for life (*y*), tenant in remainder subject to a life estate (*z*), tenant *pur autre vie* (*a*), or to an undivided moiety only (*b*); he was obliged at the purchaser's suit to convey what estate he had and to allow compensation for the deficiency (*c*). The exceptions to this rule appear to be the following:—The Court will not enforce specific performance with compensation at the purchaser's suit, where such an order would be prejudicial to the rights or interests of third parties (*d*); or where the only

Leslie v. *Tompson*, 9 Hare, 268; *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1, 7; *Scott* v. *Littledale*, 8 E. & B. 815; *Webster* v. *Cecil*, 30 Beav. 62; *North* v. *Percival*, 1898, 2 Ch. 128; 2 Dart, V. & P. 645, 5th ed.; 729, 6th ed.; 670, 7th ed.; above, pp. 41, 42.

(*t*) *Mortlock* v. *Buller*, 10 Ves. 292, 315; *Castle* v. *Wilkinson*, L. R. 5 Ch. 534, 536; *Rudd* v. *Lascelles*, 1900, 1 Ch. 815, 818.

(*u*) *Hill* v. *Buckley*, 17 Ves. 394, in which case it was also held that, where the contents of any land sold are stated in the description thereof, it must be taken that the price was fixed with reference thereto.

(*x*) *Western* v. *Russell*, 3 V. & B. 187, 192.

(*y*) *Cleaton* v. *Gower*, Finch, 164.

(*z*) *Bolingbroke's case*, 1 Sch. & Lef. 19, n., cited 2 Ph. 605; *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Barker* v. *Cox*, 4 Ch. D. 464.

(*a*) *Barnes* v. *Wood*, L. R. 8 Eq. 424.

(*b*) *Hooper* v. *Smart*, L. R. 18 Eq. 683; *Horrocks* v. *Rigby*, 9 Ch. D. 180.

(*c*) But the purchaser cannot so claim compensation for a misdescription made not in the contract, but collaterally to it; *Rutherford* v. *Acton-Adams*, 1915, A. C. 866.

(*d*) *Thomas* v. *Dering*, 1 Keen, 729, 6 L. J. (N. S.) Ch. 267; *Willmott* v. *Barber*, 15 Ch. D. 96.

property which the vendor can convey is an entirely different kind of thing from that described in the contract and the difference is incapable of estimation at a money value, as where land sold as unincumbered freehold is subject to restrictive covenants (*e*); or where the vendor has innocently made a serious error of description to his own disadvantage and it would be a great hardship to enforce specific performance with compensation against him (*f*). And where there has been a mistake in the description of land put up for sale by auction, and the mistake has been corrected orally by the auctioneer immediately before the sale, the purchaser cannot enforce specific performance with compensation, notwithstanding that he did not hear the correction (*g*). Besides this, it appears that where the purchaser bought with notice of the vendor's defect of title, he cannot enforce specific performance with compensation for the defect: except where the contract contained an express agreement that the vendor should show a good title or otherwise remove the defect (*h*). It is thought that if the contract for sale contain no stipulation at all respecting compensation for errors of description, but include the usual clause empowering the vendor to rescind in case of the purchaser's insistence on an unwelcome requisition (*i*), the vendor is at liberty to rescind the contract under this clause rather than comply with a requisition for compensation on account of a serious error of description innocently made to his own disadvantage (*k*).

Condition excluding any right to compensation for errors of description.

Where lands are sold under a stipulation that errors of description shall not annul the sale, but no compensation shall be allowed therefor (*l*), the contract is not broken at law by

(*e*) *Rudd* v. *Lascelles*, 1900, 1 Ch. 815; Fry, Sp. Perf. § 1276, 3rd ed.; and cf. below, pp. 681, 682, 684.

(*f*) *Durham* v. *Legard*, 34 Beav. 611; *Rudd* v. *Lascelles*, ubi sup.; above, p. 42.

(*g*) *Manser* v. *Back*, 6 Hare, 443; *Re Hare and O'More's Contract*, 1901, 1 Ch. 93, where there was an express contract to make compensation. The purchaser is, however, in such case entitled to rescind the contract, if he be unwilling to complete without compensation: see the case last cited.

(*h*) Above, p. 188; *Castle* v. *Wilkinson*, L. R. 5 Ch. 534; Fry, Sp. Perf. § 1271, 3rd ed. Distinguish *Barker* v. *Cox*, 4 Ch. D. 464, on the ground that there the vendor expressly undertook to procure an assurance from all necessary parties.

(*i*) Above, pp. 58, 171-175.

(*k*) Fry, Sp. Perf. § 1269, 3rd ed.; and see above, pp. 60, 171, 172, 174 and n. (*m*); and cases cited below, pp. 680, n. (*r*), 684, nn. (*u*), (*y*).

(*l*) Above, pp. 60, 66.

any small discrepancy between the property sold and that offered in fulfilment of the contract (*m*); and the vendor may enforce specific performance of the contract without compensation, notwithstanding any such discrepancy. But it is held that, as regards the enforcement of the contract at the vendor's suit, whether in equity specifically or at law, such a stipulation only covers small errors of description, and does not oblige the purchaser to accept a property which is substantially different from that which the vendor purported to sell (*n*). The better opinion is, however, that the *purchaser* is precluded by such a stipulation from requiring specific performance of the contract with compensation (*o*), whether the error of description were small or great (*p*). If the contract contain this stipulation and also the usual clause enabling the vendor to rescind (*q*), and the purchaser claim compensation for a misdescription, made innocently but involving a considerable error to the vendor's disadvantage, the vendor will be entitled to exercise the right of rescission so reserved to him (*r*).

Condition allowing compensation; the vendor's rights.

Where it is a term of the contract that errors of description shall not annul the sale, but compensation shall be made or allowed therefor (*s*), the contract is enforceable by the vendor with compensation either at law or specifically in equity, even though there be a considerable discrepancy in quantity or estate between the property sold and that offered to be conveyed, provided that this be not something substantially different in kind from what was described in the contract (*t*). Thus, where property sold as "a messuage situate in T. Street, with the builder's yard, stables and premises, as lately in the occupation of F., and containing 1,372 square yards" really comprised 1,033 only, but otherwise answered the description, it was held that the vendor was entitled to enforce specific performance

Re Fawcett and Holmes.

(*m*) *Nicoll* v. *Chambers*, 11 C. B. 996.
(*n*) *Jacobs* v. *Revell*, 1900, 2 Ch. 858; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258; *Lee* v. *Rayson*, 1917, 1 Ch. 613; and see Parker, J., *Shepherd* v. *Croft*, 1911, 1 Ch. 521, 528, 529.
(*o*) Above, p. 678.
(*p*) See cases cited above, p. 60, n. (*g*).
(*q*) Above, pp. 58, 59, 171-175.
(*r*) *Re Terry and White's Contract*, 32 Ch. D. 14; see above, pp. 60, 174 and n. (*m*); below, p. 684.
(*s*) Above, p. 60.
(*t*) *Price* v. *Macaulay*, 2 De G., M. & G. 339; *Re Fawcett and Holmes*, 42 Ch. D. 150; *Re Brewer and Hankins*, 80 L. T. 127.

with compensation (*u*). And where the stipulation is that compensation for errors of description shall be allowed on either side, the vendor is entitled at law to claim compensation for an error innocently made to his own disadvantage (*x*). It is thought, however, that as regards the specific performance of the contract, the vendor could only enforce this with compensation in his own favour in the case of small errors and could not oblige the purchaser to take a property misdescribed by the vendor's own fault at a substantial increase on the price agreed upon (*y*). But it is considered that the purchaser could not in such case insist on specific performance by the vendor without allowing him compensation according to the agreement (*z*). It is established that, under a contract containing an agreement to give compensation for errors of description, the purchaser is not bound, either at law or in equity, to accept in fulfilment of the contract a substantially different sort of property from what he agreed to buy; the rule being that the agreement in question has no application if there be a misdescription which, "although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all" (*a*). Thus, where leaseholds were put up for sale as being subject to certain particular restrictive conditions, and under an agreement providing that compensation should be made for errors of description, and the restrictive covenants contained in the lease were of a more onerous nature than was so represented, it was held that the purchaser was entitled to rescind the contract and recover his deposit (*a*). The same law was applied where an essential part of property described as held for a term of twenty-three years was held from year to year only (*b*); where land sold as copyhold turned out to be freehold (*c*); where lands sold as leasehold were held by underlease (*d*); and where property described

The rule in *Flight* v. *Booth*.

(*u*) *Re Fawcett and Holmes*, ubi sup.
(*x*) *Leslie* v. *Tompson*, 9 Hare, 268; cf. above, p. 677.
(*y*) See 2 Dart, V. & P. 645-647, 5th ed.; 729, 730, 6th ed.; 669, 670, 7th ed.; *Price* v. *North*, 2 Y. & C. 620, 626.
(*z*) 2 Dart, V. & P. 646, 5th ed.; 730, 6th ed.; 670, 7th ed.
(*a*) *Flight* v. *Booth*, 1 Bing. N. C. 370.
(*b*) *Dobell* v. *Hutchinson*, 3 A. & E. 355.
(*c*) *Ayles* v. *Cox*, 16 Beav. 23.
(*d*) *Madeley* v. *Booth*, 2 De G. & Sm. 718. This case was adversely criticised by Jessel, M. R., in *Camberwell, &c. Socy.* v. *Holloway*, 13

as a freehold ground rent was really a sum payable yearly under a covenant and not rent reserved on a demise of land (*e*). It appears, too, that where the deficiency is incapable of estimation at a pecuniary value, the condition in question is not applicable (*f*). And it is not applicable where the misdescription amounts to a wrongful misrepresentation; and this is the case although the error might well be the subject of compensation, if the misrepresentation had been innocent (*g*).

Extent of the condition for compensation.

In the cases above mentioned (*h*), where it was held that the agreement to give compensation was not applicable if the property produced were an entirely different thing from that sold, it will be observed that the difference was in a matter of right, and not of physical content. In all those cases the words of the agreement were large enough to include a mere deficiency of estate or right. The common form of this condition provides for allowing compensation if any error, mis-statement or omission, be discovered in the particulars of sale (*i*); and it appears that these words are applicable (with the limitations above mentioned) to an error or mis-statement made in the particulars with regard to a matter of right as well as of physical content (*k*). But where the condition was that compensation should be made for errors of description in the *property*, it was held that this was only applicable to mistakes in describing the land sold and did not extend to defects of title, as where land sold as leasehold is held by underlease (*l*). And where the condition was in common form, and some property not belonging to the vendor was inadvertently included in the particulars, but the property as sold was conveyed to the pur-

Debenham v. *Sawbridge.*

Ch. D. 754, 760; but its authority was recognised in *Re Beyfus and Masters' Contract*, C. A. 39 Ch. D. 110; above, pp. 93, n. (*i*), 339.

(*e*) *Evans* v. *Robins*, 8 Jur. N. S. 846; see above, p. 381.

(*f*) *Brooke* v. *Rounthwaite*, 5 Hare, 298; *Ridgway* v. *Gray*, 1 Mac. & G. 109; Fry, Sp. Perf. § 1247, 3rd ed.; cf. above, pp. 678, 679.

(*g*) Above, p. 676, and n. (*o*); cf. above, p. 174, and n. (*m*).

(*h*) Above, p. 681, nn. (*a*), (*b*), (*c*), (*d*), (*e*).

(*i*) 1 Davidson, Prec. Conv. 611, n., 4th ed.; 1 Key & Elph. Prec. Conv. 285, 10th ed.

(*k*) Thus, in *Re Fawcett and Holmes* (above, p. 680), it was held that the clause of compensation was applicable although the fact was that the vendor had no title to the land, which formed the difference between that sold and that offered in fulfilment of the contract. The vendor had formerly owned that land, but had parted with it before the contract, and had inadvertently sold by the old description; and see *Cann* v. *Cann*, 3 Sim. 447.

(*l*) *Re Beyfus and Masters' Contract*, 39 Ch. D. 110.

chaser on completion, and the mistake was not discovered until afterwards, it was held that the condition was not applicable to a defect of title so as to enable the purchaser to recover compensation under it *after completion* (*m*). But the real ground of this decision was that, where the whole of that which was sold has been actually conveyed, the entire contract is discharged, and, in the absence of fraud, no compensation is afterwards recoverable for a defect of title, except under covenants for title (*n*). And there appears to be no doubt that if in that case the mistake had been discovered before completion, compensation would have been payable under the condition (*o*).

Purchaser's rights under condition providing for compensation.

With respect to the purchaser's right to enforce the contract with compensation, where there is an express agreement to make compensation for errors of description, regard must of course be had to the exact terms of the agreement in each particular case: but the right so given does not in general exclude, or add or subtract anything to or from, the right to specific performance with compensation which the purchaser would have without it (*p*). His right in this respect under the express contract appears therefore to be generally subject to the like exceptions as the right given to him by the rules of equity under an open contract (*q*). But it has been held that where there is an express agreement to make compensation, the vendor is bound to allow it, notwithstanding that the purchaser had notice of the misdescription for which it is claimed (*r*). And it seems that where compensation is provided for by the parties' express contract, the Court will be less inclined to allow the vendor to resist specific performance with compensation on the ground of hardship than where the contract is open as regards

(*m*) *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98.
(*n*) Above, pp. 575, 612, 613.
(*o*) The error was exactly parallel to that committed in *Re Fawcett and Holmes* (above, pp. 680, 682, n. (*k*)). In one sense it was a mistake in describing the physical contents of the property sold: but the deficiency was in both cases due to the fact that the vendor had no title to part of the land described.
(*p*) Fry, Sp. Perf. § 1287, 3rd ed.; 2 Dart, V. & P. 741, 6th ed.; 681, 7th ed.; see above, p. 678. It was held in *Re Jackson and Haden's Contract*, 1905, 1 Ch. 603; 1906, 1 Ch. 412, 414, 423, 424, 426, that under such a condition the purchaser was entitled to specific performance with compensation.
(*q*) Above, p. 678.
(*r*) *Lett* v. *Randall*, 49 L. T. 71; cf. above, pp. 188, 343, 344.

compensation for misdescription (*s*). And as we have seen (*t*), under the express agreement, the purchaser may claim compensation for an error innocently made and not found out until after completion; which he could not otherwise obtain. Where the contract contained an express agreement to make compensation for any mistake in the description of the property or the vendor's interest therein, and also a proviso enabling the vendor to rescind if the purchaser persisted in any objection or requisition, and the vendor did not show a good title to some minerals included in the sale, it was held that he was entitled to rescind under the proviso on the purchaser's persisting in the objection to the title (*u*). As we have seen (*x*), it is now considered that where the contract empowers the vendor to rescind, if any requisition be insisted on which he is unwilling to comply with, he may well exercise this power without giving any reason for so doing, provided only that he act in good faith and not arbitrarily or capriciously; and such a right of rescission appears to be exercisable, if the vendor have innocently made a serious error to his own disadvantage, notwithstanding that he have expressly agreed to make compensation for errors of description and that the error be one which would properly be the subject of compensation (*y*). But where the vendor has knowingly or recklessly (though without intention to defraud) made some material misrepresentation with respect to the property sold, so that he is unable to convey a property answering to that which he contracted to sell, he is not entitled to exercise such a power of rescission so as to deprive the purchaser of *his* rights either to rescind the contract for misrepresentation or to enforce its specific performance with compensation (*z*).

Neither party can enforce specific performance with an indemnity.

If land sold be subject to some incumbrance or liability, which the vendor cannot remove, neither the vendor nor the purchaser can enforce the specific performance of the contract on the terms that the vendor shall give an indemnity against

(*s*) See *Painter* v. *Newby*, 11 Hare, 26; Fry, Sp. Perf. §§ 1290, 1291, 3rd ed.

(*t*) Above, pp. 60, 575: but see p. 683.

(*u*) *Mawson* v. *Fletcher*, L. R. 10 Eq. 212, 6 Ch. 91. Cf. *Re Jackson and Haden's Contract*, 1906, 1 Ch. 412; above, pp. 167, 187, 411.

(*x*) Above, pp. 58, 171-175.

(*y*) See *Re Terry and White's Contract*, 32 Ch. D. 14; *Ashburner* v. *Sewell*, 1891, 3 Ch. 405, 410.

(*z*) Above, p. 174 and n. (*m*).

the defect (*a*); unless, of course, the contract contain an express stipulation that such an indemnity shall be given and accepted.

Costs of the sale.

In connexion with the adjustment of accounts, the costs of the sale may be mentioned. As a rule, each party pays his own solicitor's costs (*b*): but, as we have seen (*c*), while the vendor must bear the expense of making the abstract, and producing all evidence of title in his own possession, the purchaser is bound, in the absence of stipulation to the contrary, to pay the expense of searching for, procuring and producing all evidence of title which is not in the vendor's possession. The purchaser, as a rule, bears the cost of preparing, making and perfecting the conveyance to himself; but the vendor must pay the expense of his own execution of the conveyance, including the charges of his solicitor and counsel for perusing and settling the conveyance on his behalf. This rule must, however, be read in connexion with the obligation, which is in strict law incumbent on the vendor, of getting in at his own cost prior to completion any part of the estate contracted to be sold, which is not vested in himself or in his own power (*d*). If it be necessary, in order to vest the whole estate contracted for in the purchaser, either that other persons than the vendor shall concur in the sale, or that some act shall be done by the

(*a*) *Balmanno* v. *Lumley*, 1 V. & B. 224, 225; *Fildes* v. *Hooker*, 3 Madd. 193; *Aylett* v. *Ashton*, 1 My. & Cr. 105, 114; *Nouaille* v. *Flight*, 7 Beav. 521; *Ridgway* v. *Gray*, 1 Mac. & G. 109; *Re Weston and Thomas' Contract*, 1907, 1 Ch. 244.

Solicitors' Remuneration Act and Orders.

(*b*) Under the Solicitors' Remuneration Act, 1881 (stat. 44 & 45 Vict. c. 44), ss. 2, 8, and sect. 6 of the General Order made thereunder, the remuneration of either party's solicitor will be according to the scale prescribed by that Order, unless the solicitor has, before undertaking any business, elected by writing under his hand communicated to his client that his remuneration shall be according to the previous system as altered by Schedule II. of that Order; or unless the solicitor and his client have before or after or in the course of the transaction of the business agreed, in writing signed by the party to be charged, for the remuneration of the solicitor in some other way; see *Re Frape*, 1893, 2 Ch. 284; *Re Earnshaw Wall*, 1894, 3 Ch. 156; *Re Negus*, 1895, 1 Ch. 73; *Re Baylis*, 1896, 2 Ch. 107; also *Clare* v. *Joseph*, 1907, 2 K. B. 369; *Re Peel's Settled Estates*, 1910, 1 Ch. 389; and for the Act and Order and cases thereon, see the Annual Practice. In order to be effective, such election must be duly made by the solicitor before he does for the client in the particular matter any work, for which he would be entitled to be paid; *Hester* v. *Hester*, 34 Ch. D. 607; *Re Stewart*, 41 Ch. D. 494; *Re Evans*, 1905, 1 Ch. 290. By an Order of 1919, the charges authorised by Schedule II. were increased by 33⅓ per cent.; W. N. 31st Jan. 1920.

(*c*) Above, pp. 32-34, 39, 43, 79, 97, 107, 112, 114.

(*d*) See above, pp. 582, 583.

vendor, besides the mere conveyance of such estate as is his own or in his own power, and the outstanding estate be not got in or the act be not done before completion, then the vendor must, in the absence of stipulation to the contrary, pay the expense of the concurrence of such other necessary parties in the conveyance, or of the performance of the necessary act (*e*). And, as we have seen (*f*), he may in such circumstances be called upon to bear any additional expense of the preparation of the conveyance which is incurred by reason of part of the estate being outstanding in other persons than himself. For example, the vendor being *sui juris* and fully entitled, the purchaser must pay the expense of registration of the conveyance on a sale of land situate in a register county; for in such case the vendor's conveyance passes the whole legal estate to the purchaser, who registers for his own protection against third parties (*g*). So it is thought that the purchaser must pay the expense of registration of the title, where the land sold is situate in a compulsory district; for in such case the vendor's inability to convey the legal estate by deed upon a sale is owing not to any defect in his title, but to a requirement imposed by the legislature; and the rule is that the purchaser pays the cost of conveyance to himself, save only the expense of its execution by the vendor (*h*). But where the vendor is a tenant in tail selling the fee simple (*i*), and the estate tail is not barred before completion, he must bear the cost of the enrolment of the conveyance; for he has no power to convey the fee simple without barring the entail (*k*). And where a married woman is the vendor, or is a necessary party to the conveyance, and she can only convey by deed acknowledged, the expense of acknowledgment falls on the vendor; for her inability to convey otherwise than in this manner is a defect of the vendor's title (*l*). So, on the sale of copyholds, where the vendor is fully competent to convey the legal estate, the purchaser must bear the expense of the surrender and admittance (except in respect of the vendor's execution of the surrender), including the fine on

(*e*) Above, pp. 33, 34, 582, 583.
(*f*) Above, p. 583.
(*g*) Above, pp. 361 *sq.*; *Mittelholzer* v. *Fullarton*, 6 Q. B. 989, 1019.
(*h*) Above, pp. 371-373.
(*i*) See above, p. 506.
(*k*) Dart, V. & P. 707, 5th ed.; 798, 6th ed.; 714, 7th ed.
(*l*) Dart, V. & P. 707, 5th ed.; 798, 6th ed.; 714, 7th ed.

admittance: but where the vendor or any other person must be admitted before a proper surrender to the purchaser's use can be made, the costs of and fines consequent upon such admittance must be paid by the vendor (*m*). And as we have seen (*n*), in the absence of stipulation to the contrary, the vendor must bear the expense of the concurrence in the conveyance of any mortgagees or incumbrancers or other persons, in whom is vested any part of the estate contracted to be sold. It has also been stated above (*o*) how the expenses of the execution of statutory acknowledgments and undertakings are to be borne.

If the vendor's interest in the contract or estate in the land sold have been transferred to any other person pending completion, as by his death, bankruptcy or otherwise (*p*), those who succeed to his rights are of course bound, if they complete the sale, to convey the whole estate contracted for and must at their own expense procure the conveyance to be executed by all necessary parties. And if by reason of any such transfer an application to the Court (as for a vesting order (*q*)) should be necessary in order to effect the required conveyance, those who stand in the vendor's place must bear all their own costs of the application (*r*). But if the purchaser should also be a necessary party to the application, as where the sale cannot be completed without an action for specific performance (*s*), it is held that where the application has been occasioned, not by the vendor's default, but by some cause beyond his control, as by his death or lunacy, the purchaser will not be allowed his costs of the application as against the vendor's representatives, and no costs will be given on either side (*t*). If, however, the application were made necessary by some default on the vendor's part, as where, under the old law (*u*), he had by a will made *after* the

(*m*) Dart, V. & P. 710, 5th ed.; 801, 6th ed.; 717, 7th ed.; above, pp. 336-338.
(*n*) Above, pp. 33, 44, 61, 66, 67, and n. (*c*), 582-584.
(*o*) Pp. 34, 45, 651.
(*p*) Above, pp. 502 *sq.*, 518, 530 *sq.*
(*q*) Above, pp. 510, 511, 531.
(*r*) *Williams* v. *Glenton*, L. R. 1 Ch. 200, 207, 211.
(*s*) See above, p. 511.
(*t*) *Hanson* v. *Lake*, 2 Y. & C. C. C. 328; *Hinder* v. *Streeten*, 10 Hare, 18; *Bannerman* v. *Clarke*, 3 Drew. 632; *Cresswell* v. *Haines*, 8 Jur. N. S. 208; *Barker* v. *Venables*, 11 Jur. N. S. 480.
(*u*) See above, p. 503.

contract devised to an infant the land sold and had died pending completion, the vendor's representatives will be ordered to pay the purchaser's costs of the application (*x*).

§ 5.—*Of the Execution of the Conveyance.*

Completion.

We have now arrived at the subject of the actual completion of a sale of land. This usually takes place at the office of the vendor's solicitors (*y*); and the conveyance is either executed there and then, or else, having been previously executed by the vendor and all other necessary parties, if any, it is then handed over to the purchaser in exchange for payment by him of the amount due for the price and otherwise on the adjustment of accounts between the parties (*z*). And at the same time all the title deeds and other documents of title, which were in the vendor's possession and which he has no claim to retain (*a*), are delivered over to the purchaser. The purchaser must take care that he receives a conveyance duly executed by all the conveying parties and that he pays the purchase money to such person or persons only as are entitled to receive the same and can give a good discharge therefor. He must also ascertain, as we have seen (*b*), that there is no obstacle to his entering, immediately after completion, into actual possession or enjoyment of the property sold; and of course this should be done before payment of the purchase money. The vendor must see that he gets proper payment of the price.

Attestation of the conveyance by a witness of the purchaser's choosing.

As regards the execution of the conveyance, it is enacted by the Conveyancing Act, 1881 (*c*) that on a sale the purchaser shall not be entitled to require that the conveyance to him be executed in his presence or in that of his solicitor, as such, but shall be entitled to have, at his own cost, the execution of the

(*x*) *Wortham* v. *Dacre*, 2 K. & J. 437; *Purser* v. *Darby*, 4 K. & J. 41; *Sanderson* v. *Chadwick*, 2 N. R. 414; *Williams* v. *Glenton*, L. R. 1 Ch. 200, 207, 211.

(*y*) Above, p. 66.

(*z*) Above, pp. 667 *sq.*

(*a*) Above, pp. 639 *sq.*

(*b*) Above, pp. 574, 575.

(*c*) Stat. 44 & 45 Vict. c. 41, s. 8, applying only to sales made after the year 1881. Before this enactment, the law was that, *primâ facie*, a purchaser had no right to require the vendor to execute the conveyance in the presence of himself or his solicitor; but in special circumstances he might require the vendor to do so, and the vendor was obliged to comply with such a requisition, if it were reasonable to make it. Whether this were so was a question of fact. See *Viney* v. *Chaplin*, 2 De G. & J. 468, 478; *Essex* v. *Daniell*, L. R. 10 C. P. 538.

conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor. It is thought that this enactment extends to the execution of the conveyance, not only by the vendor, but also by all other necessary parties. And where the conveying parties and their solicitors are unknown to the purchaser or his solicitors, it is a prudent precaution to insist on the exercise of the right so conferred, in order to avoid all risk of forgery or fraud (*d*). The vendor is bound, as a rule, to convey the land sold in person, and the purchaser cannot be required to accept the execution of the conveyance, on behalf of any necessary party, by attorney, except where circumstances make this course absolutely necessary (*e*).

Vendor must convey in person.

The objection to the execution of any document by attorney is of course that a power of attorney is in general revoked by the death (*f*), bankruptcy (*g*), or (it is said) insanity (*h*) of the

Power of attorney when revoked.

(*d*) See *King* v. *Smith*, 1900, 2 Ch. 425, where a landowner's solicitor fraudulently procured him to execute a mortgage of his land; *Jared* v. *Clements*, 1903, 1 Ch. 428, a case of the forgery by a solicitor of a receipt for the money due on an equitable mortgage.

(*e*) *Mitchel* v. *Neale*, 2 Ves. sen. 679; *Noel* v. *Weston*, 6 Madd. 50; Sug. V. & P. 563; Dart, V. & P. 569, 570, 5th ed.; 641, 642, 6th ed.; 592, 593, 7th ed.

(*f*) *Wallace* v. *Cook*, 5 Esp. 117; *Watson* v. *King*, 4 Camp. 272. It appears that a power of attorney to sue for a debt assigned over, whether for valuable consideration or not, might well authorise the assignee to sue at law in the names of the assignor's executors or administrators as well as in the assignor's own name; and it has been the practice of conveyancers so to extend such a power of attorney; 8 Jarm. Conv. Pt. I. 39, 3rd ed.; Davidson, Prec. Conv. vol. i. pp. 475, 476 and n., 4th ed.; vol. ii. pt. i. p. 648, pt. ii. pp. 725, 726, 4th ed.; vol. iii. pp. 748, 1280, 3rd ed.; 2 Key & Elph. Prec. Conv. 40, 41, 4th ed.; 57, 9th ed. And it seems that under such a power of attorney the assignee might sue the debtor at law after the assignor's death, and the Courts of Equity would not restrain him from doing so; see *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229, 233-236. But it does not appear that at common law a power of attorney authorising the attorney to convey the legal estate in the principal's land, whether freehold, copyhold or leasehold, could well be extended so as of itself alone to authorise the attorney to convey, after the principal's death, the legal estate, which would then be vested in the principal's heirs, devisees or personal representatives; see Litt. s. 66; Co. Litt. 52 b; *Roby* v. *Twelves*, Style, 423, 424 (where a writing in the nature of a power of attorney by a copyholder to surrender his copyhold after his death was held to be valid under a special custom in the manor: but the case was expressly distinguished from a letter of attorney at common law); *Spooner* v. *Sandilands*, 1 Y. & C. C. C. 390; *Graham* v. *Jackson*, 6 Q. B. 811; *Bailey* v. *Collett*, 18 Beav. 179, 181, 182; *Webb* v. *Kirby*, 7 De G., M. & G. 376, 381; and *Watson* v. *King*, ubi sup. (as to shares in a ship).

Extension of power of attorney to donor's representatives after his death.

(*g*) *Hovill* v. *Lethwaite*, 5 Esp. 158; *Dawson* v. *Sexton*, 1 L. J. Ch. 185.

(*h*) Story on Agency, § 481.

donor of the power. Even if given for valuable consideration, such a power is revoked at common law by the donor's death (*i*), though not by his bankruptcy (*k*) or insanity (*l*), or if the donor were a woman, by her marriage (*m*): but it appears that equitable relief would be afforded against the revocation of such a power by death (*n*). By the Conveyancing Act, 1882 (*o*), a power of attorney *given after that year for valuable consideration and expressed in the instrument creating the power to be irrevocable,* is not revoked, invalidated or affected, in favour of a purchaser (*p*), by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, or by notice of any of these things. And by the same Act (*q*), a power of attorney *given after that year and expressed in the instrument creating the power to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument,* is not revoked, invalidated or affected, in favour of a purchaser (*p*), by the same events or notice of them. And in the first of these cases, any act done at any time, and in the second any act done within the fixed time, by the donee of the power in pursuance of the power, is to be as valid, in favour of a purchaser (*p*), as if anything done at any time by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power had not been done or happened; and in both cases neither the donee of the power nor the purchaser is at any time to be prejudicially affected by notice of any of these events (*s*). The terms of these enactments, that *any act done* as above mentioned by the attorney *shall be as valid as if the event specified had*

(*i*) *Watson* v. *King*, 4 Camp. 272; and see note (*f*), above, p. 689.
(*k*) *Winch* v. *Keeley*, 1 T. R. 619; *Alley* v. *Hotson*, 4 Camp. 325.
(*l*) Story on Agency, § 483.
(*m*) *Parnham* v. *Hurst*, 8 M. & W. 743.
(*n*) See *Bromley* v. *Holland*, 7 Ves. 3, 28; *Brazier* v. *Hudson*, 9 Sim. 1, 10; *Spooner* v. *Sandilands*, 1 Y. & C. C. C. 390; *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229, 232-235.
(*o*) Stat. 45 & 46 Vict. c. 39, s. 8.
(*p*) See above, p. 233, n. (*e*), as to the meaning of *purchaser* in this Act.
(*q*) Sect. 9. It has been held that a power to sell and convey land, made irrevocable for a year under this section, is not revoked by the principal becoming an alien enemy within the year; *Tingley* v. *Müller*, 1917, 2 Ch. 144; see below, Chaps. XV., XVI.
(*s*) Stat. 45 & 46 Vict. c. 39, ss. 8, 9.

not happened, seem to be sufficiently strong to be so construed as to enable the conveyance by the attorney under the power of a legal estate in land to operate, in cases where that legal estate was no longer vested in the principal at the time of the conveyance (*t*), as the execution of a statutory power so conferred upon the attorney to convey the same (*u*). If this construction be the right one, the conveyance by the attorney of the principal's legal estate in land would be valid, in favour of a purchaser, although the principal was then dead or bankrupt, and the legal estate then vested in his heir, devisee, executors or administrator, or in the trustee in his bankruptcy. And indeed, if the Act is to be construed literally, the conveyance by the attorney under the power of the legal estate would be effective, although that legal estate had been previously conveyed away, without the concurrence of the attorney, to a third person, and even though such third person were a purchaser for value without notice of the power of attorney. But without a judicial decision on this point it certainly cannot be assumed that the Act would be so construed as to produce this extreme result, which would be quite contrary to the general rule in favour of the purchaser for value of a legal estate without notice of any adverse equity (*v*), though the words of the Act would be no more strained than in pronouncing for the validity of a conveyance by the attorney of a legal estate then vested in the principal's heir, devisee, or personal representatives. And it is clear that, unless the Act can be construed so as to validate the attorney's conveyance as against the principal's representatives after his death, it would fail to carry out its obvious intention in a most important point (*x*). Upon the whole, having regard to the difficult questions raised, it is thought that, in the absence of judicial decision, it cannot safely be assumed that the above construction will be certainly placed on the words of the Act (*y*). It is believed, however, that in

(*t*) See above, p. 689, n. (*f*).

(*u*) Consider the case of *London and County Banking Co.* v. *Goddard*, 1897, 1 Ch. 642.

(*v*) See above, p. 535, and n. (*z*); and consider the judgment of North, J., in *London and County Banking Co.* v. *Goddard*, 1897, 1 Ch. 642, 647, 651.

(*x*) See above, p. 689, n. (*f*).

(*y*) See Hood & Challis's Conveyancing and Settled Land Acts, 140, 141, 197, 7th ed.

practice it has generally been supposed that the Act has the desired effect (*z*).

Execution of the conveyance by attorney.

Before the Conveyancing Act, 1882 (*a*) took effect, it was necessary, when a purchaser accepted the execution of the conveyance by attorney on behalf of any party, that he should not allow the purchase money to be paid over into the entire control of the vendor's agent until he had received satisfactory proof of the validity of the power at the time at which it was acted on (*b*). And the best course was to stipulate for the investment of the purchase money in the meantime in the names of trustees, but at the vendor's risk (*c*). So far as regards obtaining a good discharge for the payment of the money, this course is now unnecessary where the power of attorney is expressed to be irrevocable in accordance with the Conveyancing Act, 1882, and remains so at the time of the execution of the conveyance, and extends to authorize the purchase money to be paid to the donee of the power, and the purchaser is satisfied of the due execution by the vendor of the power of attorney (*d*). With respect also to the assurance of any equitable estate, which would be extinguished or transferred in equity by the payment of the purchase money, as that of an equitable mortgagee or the owner of an equity of redemption, it appears that the purchaser would be sufficiently protected by payment of the price, or the requisite part of it, to that party's attorney under a power taking effect by virtue of the Conveyancing Act, 1882 (*e*). And

(*z*) The opinion of the late Mr. Wolstenholme appears to have been that a purchaser might safely rely on the protection given by the Act; see Wolstenholme's Conveyancing and Settled Land Acts, 109, 151-153, 8th ed.; 121, 122, 166-168, 10th ed. See also the opinion expressed in 1 Davidson's Prec. Conv. 102, 103, 5th ed.

(*a*) 45 & 46 Vict. c. 39.

(*b*) Sug. V. & P. 563.

(*c*) Dart, V. & P. 661, 5th ed.; 748, 6th ed.; 686, 7th ed.

(*d*) See stats. 44 & 45 Vict. c. 41, s. 47; 45 & 46 Vict. c. 39, ss. 8, 9 (stated above); Hood & Challis's Conveyancing and Settled Land Acts, 140, 141, 197, 7th ed.

(*e*) See previous note. In the case of an equitable mortgagee his equitable charge, and in that of the vendor of an equity of redemption or other equitable interest, his vendor's lien would be extinguished by payment of the mortgage or purchase money; and after that he and his representatives after his death would be bare trustees of any equitable estate that could possibly be considered to remain outstanding, and would be in the position of intermediate trustees between the owner of the legal estate and the purchaser. And the equitable estate of a bare intermediate trustee is such as need not be expressly conveyed to a purchaser; see Davidson, Prec. Conv. vol. ii. pt. ii. 277, 278, 4th ed.; above, pp. 46, 480, 482, 504, 578.

if the construction above suggested can be applied to the 8th and 9th sections of that Act, the above course would not now be necessary to secure the safe conveyance to the purchaser of the legal estate in case of the principal's death before the attorney's execution of the conveyance. But in the absence of any decision as to the effective operation of these sections in this respect, it seems preferable for a purchaser agreeing to accept a conveyance by attorney to stipulate that the purchase money shall be invested as above mentioned until proof is received that the vendor was living at the time of the attorney's execution of the conveyance. And where the purchaser has notice of the vendor's death before completion, he should certainly require that the vendor's executors or administrators shall concur in the conveyance to convey the legal estate in the land sold (*f*), and could not be advised to accept for that purpose a conveyance by the vendor's attorney appointed in accordance with the 8th or 9th section of the Conveyancing Act, 1882 (*q*). It is thought, however, that in such case the purchaser might rely on the protection afforded by those sections so far as regards the payment of the purchase money, or the requisite part of it, and the assurance of any equitable estate, which would be extinguished or transferred by the fact of such payment (*h*). If the power of attorney given by the vendor should not fulfil the conditions specified in those sections, as where the power, whether given for valuable consideration or not, was not *expressed* to be irrevocable, or where the power was made irrevocable under sect. 9 for a fixed time, which has expired, the course adopted in practice before the commencement of that Act should be followed. It is thought that the vendor cannot oblige the purchaser to accept the execution of the conveyance by attorney on the ground that the power of attorney may be made irrevocable under the Conveyancing Act, 1882, where there is no other reason for the execution of the conveyance by attorney. Where the conveyance is to be executed by attorney, the power of attorney should be abstracted at the vendor's expense to enable the purchaser's counsel to advise upon its sufficiency; and unless filed at the Central Office (*i*) it should be handed over to the purchaser on completion, or, if it is

(*f*) See above, pp. 503-505, 689, n. (*f*).
(*q*) See note (*d*), above, p. 692.
(*h*) See above, pp. 690, 692.
(*i*) See Conveyancing Act, 1881, s. 48.

retained because it relates to other property, an acknowledgment and undertaking should be given.

Execution of some title deed by attorney.

It has already been mentioned that, if upon the investigation of title any of the deeds or documents of title appear to have been executed by attorney, the power of attorney ought to be abstracted and produced, and evidence must be furnished, if necessary, of the validity of the power at the time when it was exercised (*k*)

To whom the purchase money should be paid.

With respect to the payment of the purchase money to the proper persons, where the purchaser has notice of any incumbrance on the property sold, he must not pay the purchase money to the vendor, but must take care that the amount due to the incumbrancers in respect of their charges is paid to them direct (*l*); and not until all such claims have been satisfied should the surplus, if any, be paid to the vendor. As a rule, where money is payable to any one, payment must be made to him in person; payment to his solicitor, banker or other agent is no discharge, unless he expressly or impliedly authorised such payment (*m*). But on the completion of sales of land, the conveying party's solicitor is usually authorised to receive the money payable to him by the effect of the 56th section of the

Execution of Trusts (War Facilities) Acts.

(*k*) Above, pp. 110, 111. By the Execution of Trusts (War Facilities) Act, 1914 (5 Geo. V. c. 13), which came into operation on 27th November, 1914, a trustee was empowered to delegate by power of attorney to any person capable of being appointed to be a trustee of the trust the execution of the trust during any period for which the trustee was engaged on war service within the meaning of the Act and one month thereafter. By the Amendment Act of 1915 (5 & 6 Geo. V. c. 70) the like power was extended to tenants for life as regards their statutory powers under the Settled Land Acts, 1882 to 1890 (but the delegation could only be made to the trustees of the settlement for the purposes of the said Acts or to one or more of them), and to executors and administrators. The Acts did not enable a trustee to delegate the execution of the trust to a co-trustee: *Re Wells and Hopkinson's Contract*, 1916, 2 Ch. 289. In *Re Donoughmore and Harkelt's Contract*, 1918, 1 I. R. 359, a power of attorney given under the Act of 1914 was objected to by a purchaser on its terms, since it did not mention the particular settlement in which the premises in question were comprised, and did not deal or purport to deal with realty in any way; and the objection was upheld.

(*l*) See above, pp. 224 *sq.*, 529, 535, 536, 589.

(*m*) *Wilkinson* v. *Candlish*, 5 Ex. 91; *Viney* v. *Chaplin*, 2 De G. & J. 468, 477, 481; *Bourdillon* v. *Roche*, 27 L. J. (N. S.) Ch. 681; *Catterall* v. *Hindle*, L. R. 2 C. P. 368; *Withington* v. *Tate*, L. R. 4 Ch. 288; *Expte. Swinbanks*, 11 Ch. D. 525.

Conveyancing Act, 1881 (*n*). This provides that, where a solicitor produces a deed having in the body thereof or indorsed thereon a receipt for consideration money or other consideration (*o*), the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any other authority in that behalf. It is considered that, under this enactment, the production by a solicitor of such a deed as above mentioned has the same effect as, and no greater virtue than, an express authority to the solicitor to receive the money; and it was therefore held that, on a sale by trustees, the purchaser might decline to act on the authority so conferred, because it would in general be a breach of trust for trustees to allow their solicitor to receive purchase money payable to them (*p*). But it was afterwards enacted by the Trustee Act, 1888 (*q*), now replaced in this respect by the Trustee Act, 1893 (*r*), with respect to the receipt of money or valuable consideration or property after the 24th of December, 1888, that a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section 56 of the Conveyancing Act, 1881; and a trustee shall not be chargeable with breach of trust, by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee. Since the law has been so altered, the purchaser on a sale of land by trustees may safely pay the purchase money to the trustees' solicitor on his producing the deed of conveyance containing a receipt and executed by them (*s*).

Solicitor's authority to receive the purchase money on production of the conveyance.

On a sale by trustees.

(*n*) Stat. 44 & 45 Vict. c. 41.
(*o*) Above, p. 652, and n. (*x*).
(*p*) *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387.
(*q*) Stat. 51 & 52 Vict. c. 59, s. 2.
(*r*) Stat. 56 & 57 Vict. c. 53, s. 17.
(*s*) *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 276, 280. As to the receipt of money by instalments and as to the revocation of the solicitor's authority by the death of a trustee, see *Re Sheppard*, 1911, 1 Ch. 50.

Where the conveyance is executed by attorney.

Where a conveyance on sale is executed by attorney (*t*) the 56th section of the Conveyancing Act, 1881, does not authorise the payment of the purchase money to the solicitor of the *attorney;* it only operates as an authority from the principal for payment to his own solicitor (*u*). And where the conveyance is to be executed by attorney, and the attorney is expressly authorised to receive the purchase money, it must be paid to him in person (*t*). Here it may be noted that, if it be arranged that the conveyance shall be executed by attorney, as where the vendor is obliged to go abroad in the service of the Crown or on business before completion (*x*), the power of attorney should be expressed to be irrevocable for a fixed time under the Conveyancing Act, 1882 (*y*), and should, if the vendor be not a trustee, either authorise the attorney to receive the purchase money (in which case it must be paid to him in person) or appoint some solicitor therein named to be the principal's solicitor to receive the money on production of the executed deed of conveyance. If the principal be a trustee, he may well appoint an attorney to execute the conveyance for him (*z*): but in such case the power of attorney should follow the words above set out of the Trustee Act, 1893 (*a*), and appoint some solicitor to receive the purchase money on his behalf by producing the deed of conveyance under section 56 of the Conveyancing Act, 1881. This course, being authorised by statute, is free from objection; whilst a trustee may not otherwise expressly authorise his solicitor to receive purchase money for him except in a case of necessity (*b*).

Payment should be made to the solicitor acting for the person entitled to give a receipt.

It appears that the solicitor referred to in the 56th section of the Conveyancing Act, 1881 (*c*), is in general the solicitor acting on behalf of the person entitled to give a receipt for

(*t*) Above, pp. 690-693.
(*u*) *Re Hetling and Merton's Contract,* 1893, 3 Ch. 269, 280.
(*x*) See above, pp. 690-693. If the vendor, being in the service of the Crown, were ordered to go abroad before completion, that would seem to be a case where the purchaser would be bound to accept execution of the conveyance by attorney.
(*y*) Above, pp. 690, 692, 693.
(*z*) *Re Hetling and Merton's Contract,* above.
(*a*) Above, p. 695.
(*b*) *Re Bellamy and Metropolitan Board of Works,* 24 Ch. D. 387, 394, 400, 403, 404. See above, p. 694, n. (*k*), as to the Execution of Trusts (War Facilities) Acts.
(*c*) Above, p. 695.

the money or other consideration (*d*). Thus, where the purchase money is partly payable to incumbrancers, the purchaser should not, it is thought, pay over the whole of the purchase money to the vendor's solicitor producing the deed of conveyance duly executed (*e*), without good independent evidence that he was authorised to act in this respect on the incumbrancers' behalf. But, of course, payment of the amount due to the incumbrancers may be paid to their solicitor on his producing the conveyance executed by them. Where a solicitor, who produces such a deed as is mentioned in that section (*f*), is ostensibly acting for the person entitled to give a receipt for the consideration money, it appears that the purchaser, in the absence of any ground for suspicion, is not entitled to require any independent proof that the solicitor is indeed authorised to act and is rightly acting as solicitor for that person (*g*). And if that person in any way held out the solicitor as his agent, he would be estopped from proving that he did not in fact authorise the solicitor to receive the money on production of the deed. Thus, where a solicitor fraudulently induced a client to execute a mortgage of his land and obtained the mortgage money by producing the mortgage deed so executed and made away with the money, but it was proved that the client placed such confidence in the solicitor that he would execute any deed on the solicitor's recommendation without insisting that the transaction should be explained to him, it was held that he was estopped from showing that the solicitor was not in truth empowered to act as his solicitor in the matter of receiving the money (*h*). But it does not appear that a purchaser would be protected in paying money to a solicitor ostensibly acting under the authority conferred by section 56 of the Conveyancing Act, 1881, if the solicitor had no real authority so to act, and the person to whom the money was payable had not by his conduct or otherwise held out the solicitor to be his agent (*i*). In all cases where money is paid to a solicitor in reliance on

Payment to solicitor ostensibly acting for a conveying party.

King v. *Smith.*

(*d*) *Day* v. *Woolwich, &c. Socy.*, 40 Ch. D. 491; *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 280.
(*e*) Above, p. 695.
(*f*) Above, p. 695.
(*g*) See *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 280; *King* v. *Smith*, 1900, 2 Ch. 425, 432.
(*h*) *King* v. *Smith*, 1900, 2 Ch. 425.
(*i*) See *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 280; above, p. 696.

The deed must be produced at the time of payment.

this enactment, the deed must be actually produced at the time of payment to justify the purchaser in making payment to the solicitor (*k*). Where a creditor or other person entitled to receive money authorises payment to be made to his solicitor, it appears that payment to the solicitor's managing clerk is, as a rule, a good payment (*l*); and this rule seems applicable where the authority to pay to the solicitor is given by virtue of the enactment above cited (*m*).

Payment to the solicitor's clerk.

What is a proper payment.

With respect to the vendor's securing for himself proper payment, he is of course only bound to accept banknotes, or Treasury notes, or coins, which are legal tender (*n*); he may object to take a cheque or any other negotiable security (*o*). At the present time sales of land are frequently completed by means of bankers' drafts (*p*), to avoid the risk and inconvenience of carrying about banknotes of large amount; but the vendor is not obliged to accept this mode of payment, and it should be ascertained before the time fixed for actual completion that he will make no objection to it. Where a solicitor is authorised to receive the purchase money or any part of it on behalf of the vendor or any other conveying party (*q*), he is not at liberty to accept payment otherwise than in cash or notes being legal tender (*r*). This is another reason for ascertaining beforehand that no objection will be made to a banker's draft, if it be desired to tender such a draft in payment.

Effect of the execution of the conveyance.

The execution of the conveyance gives to the purchaser, in the case of freeholds the legal seisin, and in the case of lease-

(*k*) *Day* v. *Woolwich, &c. Socy.*, 40 Ch. D. 491.

(*l*) See *Moffat* v. *Parsons*, 5 Taunt. 307; *Wilmot* v. *Smith*, 3 Car. & P. 453; *Bingham* v. *Allport*, 1 N. & M. 398; *Kirton* v. *Braithwaite*, 1 M. & W. 310; *Watson* v. *Hetherington*, 1 Car. & K. 36; *Hemming* v. *Hale*, 29 L. J. (N. S.) C. P. 137; *Finch* v. *Boning*, 4 C. P. D. 143.

(*m*) Above, p. 695.

(*n*) Current gold coin is legal tender for any amount; Bank of England notes for all sums above 5*l*., except by the Bank itself, but not in Ireland; current silver coin for not more than 40*s*.; bronze for not more than 1*s*.: stats. 3 & 4 Will. IV. c. 98, s. 6; 8 & 9 Vict. c. 37, s. 6; 33 Vict. c. 10, ss. 4, 20. Under the Currency and Bank Notes Act, 1914 (4 & 5 Geo. V. c. 14), s. 1, Treasury notes are legal tender in the United Kingdom for the payment of any amount.

(*o*) *Blumberg* v. *Life Interests, &c. Corpn.*, 1897, 1 Ch. 171; *Johnston* v. *Boyes*, 1899, 2 Ch. 73.

(*p*) *I.e.*, drafts drawn by bankers on themselves or branches of their office.

(*q*) Above, p. 695.

(*r*) *Papé* v. *Westacott*, 1894, 1 Q. B. 272.

holds the like possession of the land sold (*s*); and he is thenceforth free to enter into actual possession or receipt of the rents and profits of the property purchased (*t*). On the sale of copyholds, admittance is necessary to vest in the purchaser the *legal* title to possession: but on admittance being obtained, the purchaser's legal title will relate back to the surrender (*u*).

(*s*) See *Copestake* v. *Hoper*, 1908, 2 Ch. 10; articles by the author in 51 Sol. J. 478, 496, and 52 Sol. J. 510, 527; Wms. Real Prop. 217, 604, 23rd ed.; Williams on Seisin, 5, 54; *Cunliffe* v. *Fitzsimmons*, 1911, 1 K. B. 513; and consider *Kirby* v. *Cowderoy*, 1912, A. C. 599, 601-2. On the question whether the purchaser obtains a seisin in law or an actual seisin where he is *in* under the Statute of Uses and not at common law, see Williams on Settlements, 11-16; Wms. Real Prop. 185 and n. (*l*), 188, n. (*z*), 23rd ed.

(*t*) Above, pp. 491, 492, 545.

(*u*) *Doe* d. *Bennington* v. *Hall*, 16 East, 208; 1 Wat. Cop. 125, 128, 4th ed.

APPENDIX (A).

Referred to above, pages 56, 57, 59, 71—79, 231, 253, 346, 372, 630, 667, 671.

FORM OF CONDITIONS OF SALE BY AUCTION OF FREEHOLD AND LEASEHOLD PROPERTY IN LOTS (*a*).

General Conditions of Sale.

(*Applicable to all the Lots.*)

Bidding; reserve price; right to bid reserved.

1. The amount of the advance of each bidding shall be regulated by the auctioneer, and no bidding shall be retracted (*b*). There will be a reserve price for each lot; and the vendor reserves the right to bid in person or by agent as often as he may please (*c*), to consolidate any two or more lots into one,

(*a*) These conditions are intended to be annexed to particulars of sale describing the various lots, and specifying any easements or other rights, of which the purchasers are to take the benefit or bear the burthen, and which are intended to affect or enure for the benefit of other lots or other property of the vendor: see above, pp. 64, 600-605.

Lots 1 to 120 are in Yorkshire, and form part of large settled estates, of which the vendor is tenant for life. Lots 121 to 259 are unregistered land in the county of London, and belong to the vendor absolutely, Lots 121 to 199 being freehold, and the rest leasehold; and Lots 251 to 259 being held by underlease. The mines and minerals under Lots 1 to 20 are excepted, and proper working powers reserved; Lots 21 to 40 are sold subject to a rent-charge; and Lots 41 to 120 are sold as building lots, and made subject to restrictive conditions. Lots 260 to 292 are odd lots belonging to the vendor absolutely. All the conditions of sale are adapted from forms settled by the author for use in actual practice, which have passed through the ordeal of the auction mart.

The conditions are, of course, drawn exclusively in the vendor's interest: see above, pp. 68, 82. Some of these conditions are in the same form as those contained in the conditions of sale by auction settled by the author for the Solicitors' Law Stationery Society, Limited, and are re-produced here by their permission.

(*b*) See above, pp. 20, 52.

(*c*) See above, pp. 23, 24, 51.

to divide any lot into two or more lots, to vary the order of the lots and to withdraw any lot (*d*). Subject to the rights so reserved to the vendor, the highest bidder for each lot shall be the purchaser. If any dispute shall arise respecting a bidding, the property shall be put up again and resold.

Deposit; contract to be signed.

2. Each purchaser shall immediately after the sale pay a deposit of 10*l.* per cent. of his purchase money into the hands of [*the auctioneer or the vendor's solicitors*], and sign the subjoined agreement (*e*).

Time limited for making requisitions on title, &c.

3. Each purchaser shall send his requisitions and objections (if any) in respect of the title and all matters appearing on the abstract, particulars or conditions, to the office at No. —, —— Street, ——, of Messrs. ——, the vendor's solicitors, within fourteen days after the day of the delivery of his abstract; and in default of or subject only to any such requisitions and objections so made, the purchaser shall be taken to have accepted the title. All further requisitions or objections arising out of any reply by the vendor to any of the purchaser's requisitions shall be delivered within seven days after the delivery of such reply. For the purpose of the stipulations made in this condition, time shall be of the essence of the contract, and the abstract shall be deemed to be perfect (though otherwise defective) if it supply the information suggesting any requisition or objection (*f*).

Reservation to vendor of right to rescind the contract.

4. If any purchaser shall insist [*continue as in clause* 6, *above, p.* 65, *substituting seven for ten days as the time within which the requisition must be withdrawn*] (*g*).

Identity.

5. Each purchaser shall admit the identity of the lot purchased by him with the property or part of the property comprised in the muniments offered by the vendor as the title to such lot, upon such (if any) evidence as may be afforded by a comparison of the descriptions contained in the particulars of sale and in the muniments; and the vendor shall not be required to point out or distinguish the descriptions of any lot or lots now offered for sale in, amongst or from any description or descriptions contained in the muniments of any larger

(*d*) See above, pp. 24, 25.
(*e*) See above, pp. 27, 52.
(*f*) See above, pp. 56, 57.
(*g*) See above, pp. 58, 59.

property; and no objection shall be taken or requisition made on the ground of any difference or discrepancy, as to quantity or otherwise, between the description contained in the particulars of sale and any description contained in the said muniments or any of them, or with respect to any encroachment appearing to have been made (*h*).

Property sold subject to easements, tenancies, &c.

6. Each lot is sold subject to all chief, quit and other rents, outgoings and incidents of tenure, heriots, rights of way, water, drainage, light and other easements and public rights of way or otherwise, or other rights (if any) affecting the same (*i*), and to the reservation as legal easements or rights of all privileges, advantages or quasi-easements now or heretofore used or enjoyed thereover for the benefit of any adjoining or neighbouring property of the vendor, whether comprised in the present sale or not (*k*), and to any subsisting liability to repair party walls, fences, roads, streets, sewers, drains, bridges, dykes or sea walls, and to all rights of adjoining owners, and to all leases, tenancies, or occupations, whether mentioned in the particulars or not, and to all rights or claims of lessees, tenants, or occupiers (*i*). The vendor shall not be required to define the easements or other privileges or public rights to which any lot is subject, and the purchaser of any lot shall take no objection on account of any easement or privilege or public right known to the vendor not being mentioned in the particulars (*i*).

Reservation of easements.

Inspection offered of counterparts of occupation leases and tenancy agreements.

Purchaser to be deemed to buy with notice of them—

and not to be entitled to

7. The counterparts of all occupation leases and tenancy agreements of the property now offered for sale, or copies thereof, may be inspected at the office aforesaid of the vendor's solicitors (*l*) at any time during office hours within the seven days (except the Sunday) next before the sale; and every purchaser, whether so inspecting the same or not, shall be deemed to have full notice of the contents of every such lease or agreement (notwithstanding any partial or incomplete statement of such contents or of the terms of any such lease or tenancy in the particulars or these conditions, or any inaccuracy in such statement) (*m*), and shall not be entitled (save at his own

(*h*) See above, p. 59.
(*i*) See above, pp. 66 and n. (*b*), 163, 164, 605-607.
(*k*) See above, pp. 603, 604.
(*l*) In the case of a large estate, the estate office may be a more convenient place.
(*m*) As to the efficacy of such a stipulation, see *Re Derby and Fergusson's Contract*, 1912, 1 Ch. 479; above, p. 340, and n. (*c*).

any abstract of them.

Evidence, where vendor has no counterpart, or tenancy is under oral agreement.

expense) to any abstract or copy thereof; and where the vendor has no such counterpart, or any tenancy is held under an oral agreement, the purchaser shall accept such evidence of the lease or tenancy as the vendor may be able to adduce.

Boundaries, division fences or walls.

Party walls.

8. The vendor shall not be bound to show any title to boundaries, division fences, hedges or walls. Every wall or fence standing between any two lots, or between any lot and any other property of the vendor, and now used and maintained as or in the nature of a party wall or fence (of which fact the vendor or his agent shall be the sole judge), shall be deemed to be a party wall or fence (*n*).

Title to easement or profit *à prendre* enjoyed with any lot.

9. The vendor shall not be bound to produce any evidence of title to any easement, right of common or profit *à prendre* annexed to or enjoyed with any lot, or any part thereof, except such (if any) as is in the vendor's own possession, and a statutory declaration to be made, if required, at the purchaser's expense that the same has been enjoyed for the twenty years next before the sale, or from the time of commencement of title, if more recent (*o*).

Property sold and to be conveyed subject to stipulations in particulars or conditions.

10. Each lot is sold, and if the vendor shall so require shall be conveyed, with the benefit of or subject to all reservations, conditions, or other stipulations (if any) made with respect thereto in the particulars or the general or special conditions of sale, and effect shall be given to all such reservations, conditions, or stipulations in such manner as the vendor's counsel shall determine (*p*). If any lot shall not be sold at the present sale, the vendor shall (except as otherwise provided in the special conditions) stand in the place of the purchaser of such lot.

No compensation for errors of description.

11. Each lot is believed and shall be taken to be correctly described as to quantity and otherwise. If any error, misstatement or omission shall be discovered in the particulars, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof (*q*).

(*n*) See above, pp. 167, 413.
(*o*) See above, p. 74.
(*p*) See above, pp. 604-607, 701, n. (*a*).
(*q*) See above, pp. 60, 679, 680.

Vendor not selling by plan.

12. The plans annexed to the particulars are only furnished for the purpose of illustration of the descriptions contained in the particulars, and the vendor does not sell, and shall not be required to convey, according or by reference to those plans, and no objection or requisition shall be made on account of any inaccuracy therein (*r*).

Purchasers to have notice of the state of the property.

13. Every purchaser shall be deemed to buy with full notice of the actual state and condition of each lot in all respects, whether as to quantity, state of repair, means of approach, access of light, or otherwise howsoever, and shall take the property purchased by him as it is (*s*).

Purchasers to take subject to all liabilities under notices by local authorities, &c.

14. If by reason of any notice served, demand, requirement or order made, or resolution passed by any local or other authority or Court, under any statute or otherwise, whether before or after the present sale, but before the completion thereof, any legal liability, obligation or duty, whether present or prospective, shall have been or shall be imposed upon the owner or occupier for the time being of any lot or property sold, or any part thereof, to execute thereon or on any adjoining or neighbouring land any improvement, repairs, demolitions or other works of any kind, or to pay for or contribute to the cost of any improvement, repairs, demolitions or works executed or to be executed on such lot or property, or any part thereof, or on such land by such local authority, or any other body or person, the purchaser of such lot or property shall take the same subject to and shall discharge or perform such liability, obligation or duty, and shall indemnify the vendor against the same, whether any moneys to be paid pursuant to such liability, obligation or duty shall have or shall become actually due or payable or a charge on the lot or property sold before or after the day hereby fixed for completion of the purchase (*t*).

Fire insurance.

15. Any insurance against fire subsisting on or as to any lot sold, or any part thereof or any building thereon, shall from the time of sale be for the benefit of the purchaser of that lot subject to the consent of the insurers being obtained thereto

(*r*) See above, pp. 593-595.
(*s*) See above, pp. 75, 342-346, 575, 576.
(*t*) See above, pp. 77, 165-167, 497, 572, 573.

by the purchaser, and subject to the purchase being completed, and to the purchaser paying a proportionate part of the premium for the unexpired term of the insurance; but the vendor shall not be bound to keep up or renew the insurance (*u*).

Unstamped or unregistered documents.

16. No objection shall be taken on the ground of any document executed before or on the 16th of May, 1888, being unstamped or insufficiently stamped, or on account of any document which should or might have been registered in any county or other register not being so registered; and any document so executed which any purchaser may require to be stamped or further stamped, and any document which any purchaser may require to be registered, shall be so stamped or registered (if registration be possible) by and at the expense of such purchaser (*x*).

No legal apportionments to be required.

17. No legal apportionment shall be required by any purchaser of any tithe rent-charge, rent or other outgoing whatever charged upon or payable in respect of any lot together with any other property, or of any rent reserved out of or affecting any lot together with any other property; but every purchaser shall accept as conclusive such apportionment as is made or stated in the particulars or the special conditions of sale, or (if or where no such apportionment is made or stated) such apportionment as shall be made by the vendor or his agent, of any such rent-charge, outgoing or rent as aforesaid; and the concurrence therein of any other person shall not be required (*y*).

Receipts for estate duty to be accepted.

18. The receipts for payment of any estate duty, which shall have become payable in respect of the property purchased, shall be accepted as conclusive evidence of the discharge of such duty, and a certificate of discharge of such duty shall not be required (*z*). No inquiry shall be made or objection taken on account of and no proof shall be required of the discharge of any estate duty which may have become payable in respect of any mortgage forming part of the title to the property purchased on the death of one of several joint mortgagees (*a*), or

No proof to be required as to estate duty on death of joint mortgagee, or succession,

(*u*) See above, pp. 483-485. When necessary, this condition should be extended to insurance against aircraft.
(*x*) See above, pp. 72, 119, 120, 361-364.
(*y*) See above, pp. 76, 77, 351, 352, 390, 671.
(*z*) See below, Chap. XXI. § 3.
(*a*) See above, pp. 228-231.

any succession or estate duty which may have become payable in respect of or charged upon any property now offered for sale or any part thereof by reason of any death which occurred more than twelve years before the date of the present sale (*b*). or estate duty on death more than twelve years ago.

19. No proof shall be required of the incorporation or constitution or the regulations, articles of association or rules of any corporation, company or building or friendly or industrial and provident society, to or by or on behalf of which an assurance or other disposition of any property now offered for sale forms part of the title, or of the appointment of any trustees or trustee (whether original or new), director, secretary, manager or other officer of such corporation, company or society; and it shall be assumed that the persons, person, or corporation purporting to accept or make any such assurance or disposition, or to authorise or concur in the sealing or signing of any deed or other instrument evidencing such assurance or disposition, or to sign, countersign or seal any receipt given or to be given for any moneys due under any mortgage or charge securing the moneys of such corporation, company or society, were or was, or are or is the proper persons or person duly appointed or authorised so to act on behalf of such corporation, company or society and the members thereof (*c*). No proof of constitution or regulations or appointment of officer of any corporation, company or building, friendly or industrial and provident society.

20. Every purchase shall be completed on the —— day of ——, 19—, and on that day each purchaser shall pay the remainder of his purchase money, together with the value of any things agreed to be taken by him at a valuation pursuant to Special Condition No. 13, at the office aforesaid of the vendor's solicitors to the vendor or other persons or person entitled to receive the same, or as he or they shall in writing or otherwise duly authorise (*d*). Upon such payment the vendor and all other necessary parties (if any) will execute a proper assurance to each purchaser of the property purchased by him; but such assurance, and every other assurance and act (if any) which shall be required by any purchaser for getting in, surrendering, or releasing any outstanding estate, right, title or interest, or for completing or perfecting the vendor's title, or Completion of the purchases.

(*b*) See above, p. 72; below, Chap. XXI. § 3.
(*c*) See above, p. 73.
(*d*) See above, pp. 282, 283, 287, 688, 694 *sq.*

for any other purpose, shall be prepared, made and done by and at the expense of the purchaser requiring the same (*e*); and the draft of every such assurance shall be left at the office aforesaid for perusal and approval on behalf of the vendor not less than twenty-one days before the said —— day of ——, and the engrossment thereof shall be left at the same office for execution by the vendor not later than seven days before the said —— day of ——.

As to the Particulars Delivered stamp.

21. The vendor shall have the option of determining whether the contract or the conveyance shall be stamped with the Particulars Delivered stamp, and will duly present such instrument or particulars thereof as required by law; and every purchase shall be completed pursuant to the preceding Condition either (as the vendor shall determine) on the production of the contract or conveyance so stamped or on delivery to the purchaser of the official receipt for such particulars; and in the first and last of these alternative cases the purchaser shall thereafter at his own expense procure the conveyance to be stamped with the said stamp (*f*).

Any purchaser required to grant or covenant to execute at his own expense duplicate of his assurance.

22. Every purchaser, who is by the particulars or the general or special conditions or by law required to grant or create by the deed of assurance to him of the lot or property purchased by him any easement or right reserved thereover for the use of the vendor or of the purchaser of any other lot or property (*g*), or to enter into any covenant of indemnity or otherwise with the vendor or any other purchaser to be contained in such deed (*h*), shall for this purpose execute and deliver to the vendor or such other purchaser (as the case shall require) a duplicate of the said deed of assurance, to be prepared and stamped by and at the expense of the purchaser so granting or covenanting (*i*).

Custody of title deeds.

23. The vendor will retain possession of all documents of title which relate to any lot now offered for sale, and also to any other property (whether real or personal) belonging to

(*e*) See above, pp. 61, 66, 67 and n. (*c*), 583, 584.
(*f*) See above, pp. 663-667.
(*g*) See above, pp. 603, 604.
(*h*) See above, pp. 624-632.
(*i*) See above, p. 75 and n. (*e*).

the vendor, either beneficially or as trustee, and retained by him (*k*). All documents of title (other than documents of record) which relate exclusively to any of the property now offered for sale will, if relating to one lot only, be delivered to the purchaser of that lot; but if relating to more than one lot, will be retained by the vendor until the whole of the property, to which they relate, shall have been disposed of (whether at the present or some future sale) and thereafter will be delivered to the purchaser who (whether at the present or at any past or future sale) shall have bought the largest part in value of the property, to which such documents relate, or in the event of equality of purchase money, to the purchaser of the first lot in order of sale of the lots in respect of which the purchase money is equal. And the vendor will, if required, give to the purchaser of any lot, to which any documents so retained relate, a statutory acknowledgment for production of such documents, and also (unless the vendor retains possession of the documents in a fiduciary capacity) a statutory undertaking for safe custody thereof (*l*).

Rents and outgoings until and after completion.

24. The rents of each lot will be received or possession thereof retained, and the outgoings thereof (other than such outgoings as will have to be borne by the purchaser pursuant to General Condition No. 14) will be discharged by the vendor up to the said —— day of ——. As from that day the outgoings of each lot (including, where the property is in hand, any rates made before but not demanded till after that date) shall be discharged, and the rents thereof received, or possession thereof taken, by the purchaser thereof. The rents and outgoings shall, if necessary, be apportioned between the vendor and the purchaser for the purpose of this condition; but the purchaser of each lot shall pay to the vendor at the time of completion, in addition to the purchase money, the apportioned part (if any) which shall be due to the vendor under this Condition of the current rents accrued due, but not become payable, in respect of the lot sold, less the proportion of current outgoings to be borne by the vendor, and shall thereupon become entitled to receive and recover the whole of such current rents from the tenant or tenants of the property (*m*). If from any cause

(*k*) See above, pp. 640, 641.
(*l*) See above, pp. 77, 78, 642.
(*m*) See above, pp. 61, 668-670.

Interest.

whatever the purchase of any lot shall not be completed on the said —— day of ——, the purchaser shall pay interest on the remainder of his purchase money, and on the value of any things agreed to be taken by him at a valuation, at the rate of 6*l*. per cent. per annum from that day until the purchase shall be completed; but the vendor may at his option take the rents and profits, less outgoings, up to the day of actual completion instead of such interest as aforesaid; and the purchaser shall not be entitled to any compensation for the vendor's delay or otherwise (*n*).

Power of re-sale.

· · 25. If any purchaser shall fail to comply with any of the general or special conditions, his deposit shall thereupon be forfeited, and the vendor shall be at liberty to resell the lot or property bought by such purchaser at such time, in such manner and subject to such conditions as the vendor shall think fit, and any deficiency in price which may happen on and all expenses which may attend the resale, shall immediately afterwards be paid by the defaulter to the vendor, and in case of non-payment shall be recoverable by the vendor as liquidated damages (*o*).

Special Conditions of Sale.

Title commencing with deed exercising power.

1. The title to Lots 1 to 120 shall commence with an indenture of re-settlement, dated the 12th of July, 1898, and made between the Right Honourable G. A. B., second Viscount N., of the first part, the vendor, then the Honourable E. J. B., of the second part, and J. S. and F. W., of the third part. By this indenture divers hereditaments of large value, situate in the counties of York, Leicester and Northampton, and therein specified or referred to by a general description, including in effect all the hereditaments then or just before that day standing limited or settled to the uses of the will of the late G. D. B. (who died in the year 1861) were appointed by the said Viscount N. and the vendor, in exercise of a joint power of appointment vested in them by an indenture of disentailing assurance of even date, to uses under which the vendor is now seised of or entitled to the same hereditaments as tenant for life in possession without impeachment of waste. This appointment was made subject to (1) a charge of 30,000*l*. for portions

(*n*) See above, pp. 61, 62, 671-675.
(*o*) See above, pp. 62, 63.

created by the said Viscount N., by an indenture dated the 22nd of October, 1875, in exercise of a power contained in the will of the said G. D. B., and a term of 1,000 years created by the same indenture on trust to raise the said sum; and (2) a jointure rent-charge of 2,000*l.* a year charged by the said Viscount N. by an indenture dated the 1st of May, 1888, under a power contained in the same will in favour of the Right Honourable I. A., Viscountess N., now the widow of the said Viscount N., and a term of 300 years created by the same indenture for securing payment of the said rent-charge. The purchaser of any of the above-mentioned lots shall assume that the lot or property purchased by him was comprised in the property assured by the said indenture of re-settlement, and shall accept the said indenture of re-settlement as a good root of title in all respects (*p*), and shall take the lot or property purchased by him subject to the said charge of portions, term of 1,000 years, jointure rent-charge and term of 300 years, and shall not require the concurrence in the conveyance to him of the persons entitled thereunder respectively; but the vendor will, if required, covenant to keep such purchaser and the property purchased by him indemnified against the said charge of portions, jointure rent-charge and terms respectively (*q*).

Purchaser to take subject to incumbrances on indemnity.

2. The said indenture of re-settlement shall be accepted as conclusive evidence of everything recited, stated, noticed or implied therein, and also of the contents and due execution of every document recited or noticed therein, and that any such document contains nothing material to the title beyond what is so recited or noticed; and the purchaser of any of the above-mentioned lots shall not require the production of or make any requisition or objection with respect to any such document (*r*).

Recitals to be conclusive evidence of facts and documents stated.

3. The vendor is selling Lots 1 to 120 under the power of sale given by the Settled Land Acts, 1882 to 1890, to him as tenant for life under the said indenture of re-settlement (*s*), and shall not be required to enter into any further or other covenants for the title thereto than those implied by statute on his conveying as beneficial owner subject to the proviso

Restriction of tenant-for-life's covenants for title.

(*p*) See above, pp. 92, 93, 98-101, 187, 192-194.
(*q*) See above, pp. 577, 582, 583, 605, 606, 622, 684.
(*r*) See above, pp. 125-129, 180, 181.
(*s*) See above, pp. 297 *sq.*

that, as respects the reversion or remainder expectant on his life estate therein and the title to and further assurance of such property after his death, such statutory covenants shall not extend to the acts, deeds or defaults of any person or persons other than or besides himself and his own heirs and persons claiming or to claim through or in trust for him, them or some of them (*t*).

Exception of mines and minerals, and reservation of working powers.

4. All mines and minerals whatsoever in and under Lots 1 to 20 are excepted from this sale; and there shall be reserved to the vendor and other owners of the freehold of the settled estates comprised in the said indenture of re-settlement all necessary or proper powers, rights and easements for sinking pits and shafts, laying down spoil-banks, depositing coal, minerals or rubbish, forming roads, tramways or railroads, erecting buildings, cottages for workmen, and machinery, and otherwise for searching for, winning, working, getting and carrying away the said excepted mines and minerals, whether by underground or surface workings (*u*), reasonable compensation being paid to the purchasers of any of those lots for all damage done by subsidence or otherwise to the surface or any buildings now standing or to be erected thereon, and for the occupation of the surface in or about the exercise of such rights or powers (*x*).

Indemnity against rent-charge issuing out of several lots.

5. A rent-charge of 70*l*. a year is payable to St. Boniface College, Oxbridge, out of lands in Naughton comprised in the said indenture of re-settlement, but it is difficult to define exactly what particular land is charged therewith. Lots 21 to 40 are sold subject to this rent-charge, but the purchaser of any of these lots shall not require the production of any document relating to the said rent-charge, or make any inquiry with respect to its creation or continuance, or investigate the title thereto in any manner. The payment of the said rent-charge will, for the purposes of the present sale, be apportioned between and charged exclusively upon the purchasers of Lots 28, 29, 30 and 31 in manner hereinafter mentioned. In respect of Lot 28, the apportioned part of the said rent-charge is

(*t*) See above, pp. 615, 616.

(*u*) If it be desired to reserve power to let down the surface, insert here "including power to let down the surface, whether now or hereafter built upon or not."

(*x*) See above, pp. 395-399.

2*l*. 10*s*., in respect of Lot 29, 9*l*., in respect of Lot 30, 12*l*. 10*s*., and in respect of Lot 31, 46*l*. The consent of the said college to this apportionment, or their concurrence therein shall not be required. Every purchaser of any of Lots 28 to 31 shall indemnify the rest of the property comprised in Lots 21 to 40 and the owners thereof against the payment of the said rent-charge of 70*l*. and all expenses incidental thereto by covenanting with trustees for the payment of his apportioned part of the said rent-charge, and by limiting to the same trustees in fee simple a rent-charge of double the amount of his apportioned part of the said rent-charge of 70*l*. to issue out of the lot purchased by him, with the powers of distress and other powers given by sect. 44 of the Conveyancing Act, 1881, for recovering payment of the said rent-charge so to be limited and all expenses incidental thereto; and the said rent-charge so to be limited and powers for the recovery thereof shall be a security to the said trustees, not only for payment by the owner for the time being of that lot of the part apportioned to or on that lot of the said rent-charge of 70*l*., but also for the payment by such owner of such part of all expenses incidental to or to be occasioned by the non-payment of the said rent-charge of 70*l*., or the appointment of any new trustees or trustee hereunder, as shall be proportionate to such apportioned part of the said rent-charge of 70*l*.; subject to the proviso that, if and whenever such last-mentioned expenses shall be incurred or occasioned by the act, omission or default of such owner (as by his omitting to pay his apportioned part of the said rent-charge of 70*l*.), the whole of such expenses shall be recoverable by means of the said rent-charge so to be limited as aforesaid and the powers for the recovery thereof out of that lot exclusively. Such trustees shall be of such number as a majority in number of all the purchasers of Lots 21 to 40 shall determine, and shall be named as to one-half by the purchasers of Lots 28 to 31, and as to the other half by a majority in number of the other purchasers of Lots 21 to 40, and such provision for the appointment of new trustees, and other usual provisions shall be made as a majority in number of all the purchasers of Lots 21 to 40 shall determine. If any of Lots 21 to 40 shall not be sold, the vendor shall, for the purposes of this condition, stand in the place of the purchaser or purchasers of such lot or lots, except that, if any of Lots 28 to 31 shall not be sold, the vendor, being a tenant for life, shall not be required to indemnify the pur-

chasers of Lots 21 to 40 or any of them, and the property comprised therein, otherwise than by covenanting for payment of the part of the said rent-charge of 70*l.* apportioned in respect of the unsold lot or lots during his life, and charging his life interest in the same lot or lots with the payment thereof. The said deed or deeds of indemnity shall be prepared by the vendor's solicitors, and shall contain such provisions for giving effect to this Condition as the vendor's counsel shall consider necessary or expedient, and the expense of preparing and executing the same shall be borne by the purchasers of Lots 21 to 40 in equal shares (*y*).

Building lots sold subject to restrictive and other conditions.

6. Lots 41 to 120 are building lots, and are sold subject to the following conditions (*z*):—

(1.) The line of frontage of the buildings of these lots shall not approach nearer the road or roads abutting on such lots than the line marked "building line" on the Plans Nos. 2 and 3 annexed hereto respectively, except as regards porticos and bay windows or similar structures, which shall not project more than four feet beyond such line; and no building of any kind (other than such boundary wall or fence as is hereby provided for) shall be erected on any part of any of these lots lying between such building line and the said road or roads.

(2.) No house shall be erected on any of these lots on which the value of the houses to be erected is restricted by the particulars of sale, of less value than is specified in such particulars with regard to that lot.

(3.) Any one of these lots which shall be sold shall be pegged out by the vendor's surveyor before the purchaser shall take possession thereof.

(4.) Every purchaser of any of these lots shall, at his own expense within one year after the present sale, erect round the lot purchased by him, or round or along so much thereof as the vendor's surveyor shall require to be fenced, a boundary wall or fence of such materials, size and proportions as shall be required by such surveyor and to the satisfaction of such surveyor, and shall for ever after at his own expense

(*y*) See above, pp. 76-78, 630. (*z*) See above, pp. 78, 467 *sq.*

maintain such wall or fence in good repair. Provided that the boundary wall or fence along any boundary marked "T" in the said Plans Nos. 2 or 3 shall be erected entirely at the expense of the purchaser of the lot whereon such boundary is so marked, and shall be the exclusive property of the purchaser so erecting the same, but the boundary wall or fence along any boundary marked "I" in the said Plans Nos. 2 or 3 shall be erected and maintained at the joint expense of the purchasers of the lots divided by such boundary, and shall be party-walls or fences to which such purchasers shall be entitled as tenants in common. And such surveyor as aforesaid may determine whether any existing boundary wall or fence on any of these lots is sufficient or shall be replaced, added to or altered in order to comply with the above stipulation, and his determination on any of these questions shall be absolutely conclusive and binding on all purchasers at the present sale. Any existing boundary wall or fence marked "T" in the said Plans Nos. 2 or 3 shall be the exclusive property of the purchaser of the lot whereon it is erected, and any such wall or fence marked "I" in the same plans shall be a party-wall or fence, and shall belong to the purchasers of the lots divided thereby as tenants in common. If any lot on which the boundary is marked "I" on these plans shall not be sold at the present sale, the vendor will, as regards the property in any existing wall or fence erected on such boundary (but not otherwise), stand in the place of a purchaser of such lot; but the vendor shall not incur any obligation to contribute to the expense of replacing, adding to or altering such wall or fence, and where there is no existing wall or fence or such boundary, the vendor shall not be bound to contribute to the expense of erecting one, but may require the purchaser of the lot on the other side of such boundary to erect such boundary wall or fence as is hereby provided for entirely within such purchaser's own lot and at such purchaser's own expense entirely, such wall or fence when so erected to be such purchaser's exclusive property.

(5.) No operative machinery or hut, shed, caravan, outdoor

sleeping apartment, or other like structure or erection shall be fixed or placed on any of these lots except with the previous approval in writing of the vendor or his agent. And no portion of any of these lots shall be used (except as provided in the particulars of sale) as a road or way from or to any land adjoining or adjacent to the estate of the vendor.

(6.) No house or other building shall be erected on any of Lots 81 to 120, except in such situation and position as shall have been previously indicated to and approved of in writing by the vendor or his agent or otherwise than in conformity with plans, elevations and specifications which shall have been previously submitted to and approved of in writing by the vendor or his agent, nor shall any alteration therein or addition thereto be made without the like approval previously obtained.

(7.) These lots (41 to 120) shall not, nor shall any building erected on any of them be used as a hospital, or for any offensive, noisy, or dangerous pursuit or operation, or for any purpose which shall be a nuisance or annoyance to the vendor or the owners or occupiers of any other part or parts of the N. Settled Estates in the city of Nilchester or any of them, or any purchaser at the present sale, and no building erected on any of Lots 95 to 120 shall be used otherwise than as a private dwelling-house, or as a coach-house or stabling, motor car or cycle house, or greenhouse connected therewith.

(8.) As between the purchasers at the present sale, the benefit as well as the burthen of these conditions (so far as they are restrictive of the use of or otherwise capable of running with land) shall be annexed to the lots hereinafter specified, so as to be enforceable by and against the purchasers thereof, their heirs and assigns to the following extent, but no further, namely, such of those conditions as relate to Lots 41 to 80, to those lots only; such of those conditions as relate to Lots 81 to 94, to those lots only; and such of those conditions as relate to Lots 95 to 120, to those lots only (*a*).

(*a*) The reason of this stipulation is that Lots 41 to 120 comprise three blocks of land (Lots 41-80, 81-94, and 95-120), each situate some distance apart from the other.

But every purchaser of any of Lots 41 to 120 shall, in the conveyance of the property purchased by him covenant with the vendor and his successors in estate to observe all such of these conditions as relate to such property to the intent that, so far as these conditions are restrictive or capable of running with land, the burthen thereof shall run with such property, and the benefit thereof run with the N. Settled Estates situate in or near the city of Nilchester, or any part thereof, including any lot or lots which shall not be sold at the present sale.

(9.) Provided always that if any of Lots 41 to 120 shall not be sold at the present sale, the vendor shall not (except as hereinbefore provided) stand in the place of a purchaser thereof so as to be bound by the burthen of these conditions or any obligation therein imposed, but shall hold any such unsold lot free from all such conditions, burthen and obligation, and shall be at liberty to sell or dispose of the same at any time on such terms and conditions (if any) as he shall think fit.

(10.) In this Special Condition No. 6 and the conditions herein contained the expression "the vendor" shall, except where repugnant to the context, include alternatively the other person or persons for the time being entitled in remainder expectant on the vendor's life estate under the above-mentioned indenture of resettlement or the heirs of the body of such of them as are so entitled in fee tail or the heirs or assigns of such of them as are so entitled in fee simple.

Title commencing with general devise.

7. The title to Lots 121 to 199 shall commence with the will dated the 12th of September, 1890, of the Right Honourable W. G. B., first Viscount N., who died on the 31st of December, 1890. By this will the said testator devised all his real estate not otherwise disposed of to his eldest son, the Honourable G. A. B. (afterwards the second Viscount N.), absolutely, but charged, in case the testator's personal estate not specifically bequeathed should be insufficient to pay his debts, funeral and testamentary expenses and the pecuniary legacies and annuities given by his will or any codicil thereto, with the payment of such deficiency in aid of his residuary

personal estate. The purchaser of any of these lots shall assume that the said testator was at the date of his death seised of all these lots for an unincumbered estate in fee simple (subject only to the leases or tenancies then affecting the same respectively), and that these lots formed part of the said testator's residuary real estate (*b*); and shall not (save at his own expense) require any further or other abstract of the said will than of that part thereof which contains the above devise; and shall not make any requisition or inquiry with respect to or take any objection on account of the said charge in aid of the said testator's personalty, but shall assume that the said testator's funeral and testamentary expenses, debts, and legacies and annuities have all been duly paid, satisfied or provided for.

Leasehold lots held under one lease at an entire rent.

8. Lots 200 to 239 are held at one entire rent for the residue of a term of 99 years from the 29th of September, 1896, granted by an indenture dated the 3rd of December, 1896, and made between S. L. of the one part and T. B. of the other part. The title to these lots shall commence with this indenture (*c*), and the sale thereof shall be carried out in the following manner (*d*):—The rent shall be apportioned between these lots in the sums stated in the particulars and the purchaser of the largest part in value of these lots, or in the event of equality of purchase money the purchaser of such one of these lots as the vendor shall designate, shall take an assignment of the lease and shall execute underleases of the other lots to the purchasers thereof respectively for the whole term granted by the lease less one day, at the said apportioned rents respectively. Every such underlease shall contain proper covenants by the purchaser of the lot comprised therein for payment of the rent apportioned, and performance and observance of the covenants in the original lease in respect of such lot, and a proviso for re-entry by the grantor of the underlease on non-payment of the rent reserved thereby, or breach of any covenant contained therein, and also usual covenants by the grantor of the underlease for quiet enjoyment by the underlessee and for payment of the rent reserved by and performance and observance of the covenants contained in the original lease in respect of the rest of the property demised thereby, and a statutory acknowledgment and under-

(*b*) See above, p. 98.
(*c*) See above, pp. 92-94.
(*d*) See above, pp. 78, 253, 352.

taking by the grantor of the underlease for production and safe custody of the original lease, and such other documents evidencing the subsequent title thereto as shall be handed over to the grantor of the underlease on the completion of the sale of the property purchased by him, but not any covenants for title by the vendor or other covenant of any kind. The purchaser of the largest part in value of the above-mentioned lots, or the purchaser designated as aforesaid, shall execute and deliver to the vendor a duplicate of the above-mentioned assignment, to be prepared and stamped by and at the expense of such purchaser, and every underlessee shall execute and deliver to the grantor of his underlease a counterpart of such underlease, to be prepared and stamped by and at the expense of such underlessee. If any lot shall remain unsold, the vendor shall, for the purposes of this condition, stand in the place of the purchaser of the largest part in value of the above-mentioned lots. The form of such assignment and of every such underlease shall be settled in case of dispute by the vendor's counsel, whose decision thereon shall be final and binding on all parties.

Other leasehold lots.

9. Lots 240 to 250, 291 and 292 are held by lease for the residue of the respective terms mentioned in the particulars, and the title thereto shall commence with the indentures granting such leases respectively (*e*).

Lots held by underlease.

10. Lots 251 to 259 are held by underlease for the residue of the respective terms stated in the particulars, and the title thereto shall commence with the indentures granting such underleases respectively, and no objection shall be taken on the ground of any of these lots being held by underlease (*f*).

As to the leasehold lots.

11. Lots 200 to 259, 291 and 292, being leasehold, are sold subject to the rent, covenants, conditions and all liabilities under the leases whereby the same are held respectively, and Lots 251 to 259, being held by underlease, are also sold subject to every superior lease and all liabilities thereunder (*g*); and no objection shall be taken on the ground that any lease, under which any property now offered for sale is held by the vendor, was granted in exercise of a power, and the instrument con-

(*e*) See above, pp. 92-94.
(*f*) See above, pp. 74, 91-93 and n. (*i*), 339.
(*g*) See above, pp. 76, 91, 93.

ferring the power shall not be required to be abstracted or produced (*h*). Every lease under which any property now offered for sale is held by the vendor, or a copy thereof, may be inspected at the office aforesaid of the vendor's solicitors at any time during office hours within the seven days (except the Sunday) next before the day of sale; and every purchaser, whether he shall avail himself of this opportunity of inspection or not, shall be deemed to have full notice of the contents of every such lease, whether of a usual character or not (*i*). The production of a receipt for the last payment of rent accrued due under any such lease prior to completion shall be accepted as conclusive evidence that all the covenants and conditions contained in the said lease, and also (in the case of any lot held by underlease) in every superior lease, have been duly performed and observed, or that any breach thereof has been effectually waived down to the time of actual completion of the purchase; and it shall be assumed without proof that the person or persons giving such receipt, though not the original lessor, is or are the reversioner or reversioners expectant on the said lease or his or their duly authorised agent or agents (*k*).

Completion as to lots in the county of London.

12. The purchase of any of Lots 121 to 259 shall be completed and the purchase money therefor paid by the purchaser thereof at the time and place and in the manner specified in General Condition No. 20; and upon execution by the vendor, or other necessary conveying parties, of such assurance by deed of the lot or property purchased as the purchaser shall be entitled under General Condition No. 20 or Special Condition No. 8 to require, notwithstanding that the purchaser must be registered under the Land Transfer Acts, 1875 and 1897, as the proprietor of such lot or property before the legal estate therein can pass to him; and every purchaser of any of Lots 240 to 259 shall, after such completion of his purchase, at his own expense in all respects, forthwith take all proceedings necessary to procure such registration and complete such registration as soon as possible, and in any case not later than six calendar (*l*) months after such completion (*m*).

(*h*) See above, p. 99 and n. (*p*).
(*i*) See above, pp. 74, 339, 340.
(*k*) See above, pp. 74-76, 339-347.
(*l*) See below, p. 729, n. (*o*).
(*m*) See above, pp. 367-372.

13. The tenant's fixtures on any of Lots 240—259, 291 and 292, and the timber and other trees, tellers, pollards, saplings and underwood, down to the value of 1*s.* per stick, on any of Lots 10 to 15, and 27 to 32, shall be paid for by the purchaser at a valuation to be made [*continue as in Form* 3, *on p.* 64, *above, or as in note* (*s*) *thereto*]. Fixtures and timber on certain lots to be paid for at a valuation.

14. The title to Lot 260 shall commence with an indenture dated the 3rd day of May, 1906, and made between Arthur Jones of the one part and William Thompson of the other part, being a conveyance on sale of the equity of redemption of the property comprised in that lot, subject to a mortgage for 1,000*l.*, which was subsequently paid off. This indenture shall be accepted as a sufficient root of title, and the earlier title shall not be investigated or inquired into (*n*). Title commencing with the conveyance of an equity of redemption.

15. Lot 261 is sold subject to a mortgage thereon for 1,500*l.* made by an indenture dated the 4th June, 1898. The title shall commence with this indenture, and the purchaser shall be entitled to a conveyance of the equity of redemption only (*o*). Sale of equity of redemption.

16. The title to Lot 262 shall commence with an indenture dated the 13th day of July, 1900, and made between Frederick Fisher of the one part and James Venables and George Gurney of the other, being a transfer of a mortgage for 5,000*l.* then subsisting thereon; and this indenture shall be accepted as a sufficient root of title (*p*). Title commencing with transfer of mortgage.

17. The title to Lots 263 to 270, both inclusive, shall commence with an indenture dated the 3rd day of January, 1900, and made between the Right Hon. G. A. B., second Viscount N., of the one part and the vendor, then the Hon. E. J. B. of the other part, being a voluntary conveyance to the vendor of the property comprised in those lots (*q*). Title commencing with voluntary conveyance.

18. Lot 263 is sold subject to the right of way granted over the close No. 116 in the sale plan along the track marked Lot sold subject to a right of way.

(*n*) See above, pp. 71, 98, 180 *sq.*, 187, 188.
(*o*) See above, p. 71.
(*p*) See above, pp. 71, 98.
(*q*) See above, pp. 71, 100, 183, 184.

on the said plan in favour of the owners of the Hall Farm by an indenture dated the 14th of April, 1891 (*r*).

Title commencing with disentailing assurance.

19. The title to Lots 271 to 280, both inclusive, shall commence with an indenture dated the 3rd day of May, 1898, and made between the vendor of the one part and Joseph Wilson of the other part, being a disentailing assurance by the vendor of the property comprised in those lots (*s*).

Lots sold free of land tax and tithe rent-charge.

20. Lots 271 to 276, both inclusive, are sold free of land tax and tithe rent-charge; but no proof of this shall be required except a declaration by the vendor's agent to be made, if required by any purchaser of any of those lots, at such purchaser's expense, that no land tax or tithe rent-charge has been paid or demanded in respect of any of these lots for the last twenty years (*t*).

Lot sold subject to reservation of right of access of light and air.

21. Lot 277 is sold subject to the reservation thereover to the vendor, his heirs and assigns, of the right of the access of light and air to the house called Stoke House standing on the land adjoining that lot on the north side thereof, as the same is now enjoyed through the existing windows in that house (*u*).

Lot sold subject to reservation of right of way.

22. Lot 278 is sold subject to the reservation thereover to the vendor, his heirs and assigns, of a right of way for all purposes along the road marked and coloured yellow in the sale plan to and from the farm called The Grange from and to the high road leading from Blackstow to Whiteford (*x*).

Sale of the reversion on a long lease for years.

23. Each of Lots 281 to 290, both inclusive, is sold subject to the lease granted by the late Robert Charles Wright, Esq., by an indenture dated the 12th March, 1908, of all those lots for the term of 99 years from the 24th June, 1907, at the yearly rent of 100*l*.; and the apportioned parts of this rent to be received by the purchasers of those lots respectively shall be those stated in the particulars of sale. The title to each of these lots shall commence with the said indenture of lease

(*r*) See above, p. 71.
(*s*) See above, p. 71.
(*t*) See above, p. 74.
(*u*) See above, pp. 74, 603.
(*x*) See above, pp. 74, 603.

(which shall be accepted as a sufficient root of title), followed by the will dated the 9th June, 1914, of the said R. C. Wright, who died on the 18th October, 1914; and it shall be assumed that the said R. C. Wright was at the date of the said lease and thenceforward until the day of his death seised of the demised premises for an unincumbered estate in fee simple (*y*). The purchaser of any of these lots shall take the same subject to the liability, which arose on the death of the said R. C. Wright, to the succession duty payable at the expiration of the said term in respect of the increased value then accruing of the property (*z*).

Leaseholds held under a lease comprising other property.

24. Lot 291 is held for the residue of a term of 80 years from the 29th of September, 1904, created by a lease dated the 10th of December, 1904, whereby this lot, together with other property lately sold by the vendor, was demised to the vendor at the yearly rent of 100*l.* for the entire property demised. No objection shall be taken or indemnity required on this account. The yearly rent payable for this lot was apportioned as between the vendor and the purchaser of the other part of the demised premises, at the sum of 50*l.*; and the purchaser of this lot shall accept such apportionment as sufficient (*a*).

Leaseholds subject to a covenant not to assign or underlet without the lessor's consent.

25. Lot 292 is held under a lease containing a covenant not to assign or underlet without the lessor's consent in writing. The vendor will endeavour to procure such consent at his own expense, but the purchaser shall for this purpose at his expense furnish to the vendor for production to the landlord the usual references (two) as to his responsibility for the rent and covenants of the lease. If the person to give such consent shall not be the original lessor, the purchaser shall not investigate the lessor's title, or require any proof that the person giving such consent is the proper person to do so, but shall accept as sufficient the vendor's statement that the person giving such consent is the proper person to do so. If the vendor shall be unable to procure such consent, the contract for the sale of that lot shall be void, and the deposit shall be returned to the purchaser: but the purchaser shall not be entitled to any interest on the deposit

(*y*) See above, p. 71.
(*z*) See above, p. 383.
(*a*) See above, pp. 76, 77, 350, 351.

or to be paid his expenses of investigating the title or any other compensation (*b*).

[*Add memorandum to be indorsed on the conditions in the same form as that on p.* 68, *above, substituting,* "was declared the purchaser of Lot —— thereof."]

(*b*) See above, pp. 76, 348-350. An alternative form in such a case is: "If the vendor shall be unable to procure such consent, the contract shall be completed by the execution by the vendor of a declaration of trust in the purchaser's favour." This would not operate as a breach of the above covenant; see above, p. 350. If the covenant in the lease should extend to prohibit parting with the possession of the demised premises without the lessor's consent, the form in the text should be used, with the addition of stating that the covenant so extends. If the covenant in the lease should prohibit assignment only without the lessor's consent, it may be stipulated that, if the vendor shall be unable to procure such consent, the purchaser shall accept an underlease from the vendor for the residue of the term granted by the lease, except the last day thereof, at the same rent, and subject to the same covenants and conditions as in the lease.

APPENDIX (B).

(*Referred to above, pp.* 83, 85, 87.)

FORM OF CONTRACT FOR PRIVATE SALE OF FREEHOLD LAND, WITH STIPULATIONS NOT SETTLED EXCLUSIVELY IN THE VENDOR'S INTEREST (*a*).

ARTICLES OF AGREEMENT made this —— day of ——, 19—, BETWEEN A. B., of [*insert description*] (hereinafter referred to as "the vendor"), of the one part, and C. D., of [*insert description*] (hereinafter referred to as "the purchaser"), of the other part. IT IS HEREBY AGREED between the said parties hereto as follows (that is to say):—

Agreement for sale.

1. The vendor shall sell and the purchaser shall buy at the price of ——*l.* the freehold in fee simple, subject to the tenancies specified in the schedule hereto but otherwise free from incumbrances, of all those lands tenements and hereditaments particularly described in the schedule hereto.

Deposit.

2. The purchaser shall immediately upon signing this agreement pay the sum of ——*l.* (*b*) as a deposit and in part payment of the purchase money into the hands of Messrs. ——, of [*insert address of office*] the vendor's solicitors, who shall receive and hold the same as stakeholders (*c*).

Fixtures and timber to be taken at a valuation.

3. The fixtures in the house known as —— Hall, ——, and the landlord's fixtures in the farmhouses at —— Farm and —— Farm, and the timber and other trees, tellers, pollards, saplings and underwood upon the whole property sold down to the value

(*a*) See above, pp. 79-87.
(*b*) Usually 10 per cent. of the purchase money.
(*c*) See above, pp. 27, 82, 83.

of 1*s*. per stick shall be paid for by the purchaser at a valuation, &c. [*continue as in Condition* 3, *p.* 64, *above*] (*d*).

Commencement of title.

4. The title shall commence with an indenture dated, &c., and made between, &c. [*for example, a deed dated thirty-two years before the contract*], the vendor undertaking that the said indenture shall prove to be a good root of title (*e*).

Vendor to produce at his own expense all documents in possession of mortgagees.

5. The vendor shall pay all such expenses of the production for verification of the abstract and the examination by the purchaser's solicitors of any documents of title which the purchaser can require to be abstracted and which are in the possession of any mortgagee or other incumbrancer or any other person than the vendor, as the vendor would be bound to pay if the said documents were in his own possession (*f*).

Time limited for delivery of abstract and making requisitions on title, &c.

6. The vendor shall send an abstract of his title to the purchaser's solicitors within fourteen days from the present date, and the purchaser shall send his requisitions and objections (if any) in respect of the title and all matters appearing on the abstract or this agreement to the office at ——, aforesaid of the vendor's said solicitors within twenty-one days after the day of the delivery of the abstract, and in these respects time shall be of the essence of the contract (*g*). In default of or subject only to any such requisitions and objections so made, the purchaser shall be taken to have accepted the title.

(*d*) See above, pp. 55, 84.

(*e*) See above, p. 84.

(*f*) See above, p. 85. The words "or any other person than the vendor" can be struck out if the vendor will not agree to their insertion. The above clause leaves the purchaser to bear the expenses of producing all evidence, which is not in the vendor's possession, of facts material to the title but not proved by such documents of title; for instance, facts of pedigree; see above, pp. 33, 39, 40, 43, 139. If the vendor can be induced to undertake the whole expense of verifying the abstract, the following clause should be substituted for the above clause:—"Section 3, sub-section 6 of the Conveyancing Act, 1881, shall not apply to the contract hereby made, except so far as it relates to the expenses of making any copy, which the purchaser may require to be delivered to him, of any document, which the vendor is entitled to retain." The vendor would then incur the common law obligation of verifying the abstract; above, pp. 33, n. (*h*), 79; Sug. V. & P. 417, 420, 429-431; 1 Davidson, Prec. Conv. 550, 4th ed. It is thought to be reasonable that the purchaser should bear the expense of attested or other copies, if he should require them; see above, pp. 34, n. (*s*), 44.

(*g*) See above, p. 84.

Reservation to vendor of right to rescind the contract.

7. If the purchaser shall insist on any requisition or objection as to the title, evidence of title, conveyance, possession, receipt of rents or any other matter appearing on the abstract or this agreement or connected with the sale which the vendor shall be unable or on the ground of expense or other reasonable ground (*h*) unwilling to remove or comply with, the vendor shall be at liberty, notwithstanding any negotiation or litigation in respect of such requisition or objection, to give to the purchaser or his solicitors notice in writing of his intention to rescind the contract for sale unless such requisition or objection shall be withdrawn; and if such notice shall be given and the requisition or objection shall not be withdrawn within ten days after the day on which the notice was sent, the contract shall without further notice be rescinded. The vendor shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatever.

Identity.

8. The purchaser shall admit the identity of the property purchased with that comprised in the muniments offered by the vendor as the title to such property upon the evidence afforded by a comparison of the descriptions contained in the schedule hereto and in the muniments, together with a statutory declaration, to be made at the vendor's expense by some person acquainted with the property and the facts, that the property purchased has been enjoyed in accordance with the abstracted title for the twenty years next before the present date (*i*).

Compensation for errors of description.

9. The property is believed and shall be taken to be correctly described as to quantity and otherwise. The property is sold subject to all chief and other rents, incidents of tenure, rights of way and water, and other easements (if any), and public rights of way or other public rights (if any) charged or subsisting thereon, and to all leases, tenancies and occupations, whether mentioned in the schedule hereto or not; and to all rights and claims of lessees, tenants and occupiers (*k*). If any error, misstatement, or omission be discovered in the schedule hereto, the same shall not annul the sale, but reasonable compensation shall be allowed by the vendor or the purchaser, as

(*h*) See above, p. 85. (*i*) See above, p. 85.
(*k*) See above, p. 66, n. (*b*).

the case may require, in respect thereof (*l*), and the amount of such compensation shall in case of dispute be settled by two arbitrators or their umpire pursuant to the Arbitration Act, 1889 (*m*).

Completion.

10. The purchaser shall pay the remainder of his purchase money, and the value of the fixtures, timber and other trees, tellers, pollards, saplings, and underwood, on the —— day of —— next, at the office aforesaid of the vendor's said solicitors, to the vendor or as he shall in writing or otherwise duly

(*l*) See above, pp. 86, 630 *sq.*

Liabilities under notices by local authorities, &c.

(*m*) If by reason of the situation or condition of the property, it is liable to be or to become subject to some statutory charge or liability at the instance of some local authority (see above, pp. 77, 165, 166, 497, 498, 572, 573), the following form may be used instead of that given above, p. 705:—"If by reason of any notice served, demand, requirement or order made, or resolution [to the knowledge of the vendor] passed by any local or other authority or Court, under any statute or otherwise, before the present sale, any legal liability, obligation or duty, whether present or prospective, shall have been imposed upon the owner or occupier for the time being of the property sold, or any part thereof, to execute thereon, or on any adjoining or neighbouring land, any improvement, repairs, demolitions or works of any kind, or to pay for or contribute to the cost of any improvement, repairs, demolitions or works executed or to be executed on the property sold, or any part thereof, or on such land by such local authority or any other body or person, the vendor shall discharge or perform such liability, obligation or duty, and shall indemnify the purchaser against the same, whether any moneys to be paid pursuant to such liability, obligation or duty shall have or shall become actually due or payable or a charge on the property sold before or after the day hereby fixed for completion of the purchase. And if any such notice shall be served, demand, requirement or order made, or resolution passed after the present sale, the purchaser shall take the property subject to and shall discharge or perform such liability, obligation or duty, and shall indemnify the vendor against the same, whether any moneys to be paid pursuant to such liability, obligation or duty shall become actually due or payable or a charge on the property sold before or after the day hereby fixed for completion of the purchase." In most of the above cases the vendor would necessarily be aware of the creation of the liability, or prospective liability, if incurred before the sale; so it is only fair that he should either disclose it to the purchaser and expressly stipulate that the purchaser shall bear it, or should contract to bear it himself; see above, p. 573, n. (*p*). But under the Private Street Works Act, 1892 (stat. 55 & 56 Vict. c. 57), s. 6, the prospective liability is created by the resolution of the local authority, though the charge given by that Act does not arise until the completion of the works resolved to be done (*Stock* v. *Meakin*, 1900, 1 Ch. 683); so that a prospective liability under this Act may be created before the date of a sale without the vendor's knowledge. For this reason a vendor will desire to insert in the above stipulation the words in square brackets, thus leaving a liability already incurred under that Act without his knowledge to fall as by law determined. The purchaser will, of course, desire to have those words struck out.

authorise. Upon such payment the vendor and all other necessary parties (if any) will execute a proper assurance of the property to the purchaser. Such assurance shall be prepared by and at the expense of the purchaser (*n*); and the draft thereof shall be delivered at the office aforesaid for perusal and approval on behalf of the vendor not less than one calendar month (*o*) before the —— day of —— next, and the engrossment thereof shall be delivered at the same office for execution by the vendor not less than seven days before the —— day of —— next.

Particulars Delivered stamp.

11. The vendor shall, as soon as possible and at his own expense, procure this contract and a duplicate thereof signed by him to be stamped with the Particulars Delivered stamp (*p*), and deliver such duplicate when so stamped to the purchaser (*q*).

Rents, outgoings, &c.

12. The rents will be received or possession retained, and the outgoings discharged by the vendor up to the said —— day of —— next. As from that day the outgoings shall be discharged, the rents received, and possession taken by the purchaser. The rents and outgoings shall, if necessary, be apportioned between the vendor and the purchaser for the purpose of this condition (*r*).

Interest.

13. If the purchase shall not be completed on the said —— day of —— next, the purchaser shall pay interest on the remainder of his purchase money and on the aforesaid value of the fixtures, timber and other trees, tellers, pollards, saplings, and underwood, at the rate of 5*l.* per cent. per annum from that day until the purchase shall be completed; provided that

(*n*) See above, p. 86.

(*o*) In contracts for the sale of land the word *month* means *primâ facie* a lunar month, but will mean a calendar month if it can be shown, either from the context or from surrounding circumstances, that such was the intention of the parties: *Lang* v. *Gale*, 1 M. & S. 111; *Simpson* v. *Margitson*, 11 Q. B. 23; *Bruner* v. *Moore*, 1904, 1 Ch. 305; *Morrell* v. *Studd*, 1913, 2 Ch. 648, 655; Sug. V. & P. 257; 1 Dart, V. & P. 427, 5th ed.; 492, 6th ed.; 506, 7th ed.

(*p*) See above, pp. 665-667.

(*q*) The contract should be executed in triplicate, the purchaser signing one copy to be kept by the vendor and the vendor signing two copies and delivering one to the purchaser at once and retaining the other till stamped, as above provided. The purchaser will then be enabled to procure the conveyance to be stamped under stat. 10 Edw. VII. c. 8, s. 4 (7); see above, p. 665.

(*r*) See above, p. 86.

Power for purchaser to place purchase money on deposit.

if the delay in completion shall arise from any other cause than the purchaser's own neglect or default, he shall be at liberty at his own risk to place the balance of the purchase money and the amount (so soon as ascertained) of any valuation to be made under this agreement in some bank to a deposit account and to give to the vendor or his solicitors notice in writing of such deposit, and after such deposit and notice he shall not be chargeable with interest on any purchase money so deposited at a higher rate than shall be allowed thereon by the bank (*s*).

Power of re-sale.

14. Subject to the next succeeding clause of this agreement, if the purchaser shall fail to comply with the above stipulations, the deposit shall be forfeited to the vendor, and the vendor shall be at liberty to re-sell the property at such time, in such manner, and subject to such conditions as he shall think fit; and any deficiency in price which may happen on, and all expenses which may attend the re-sale, shall immediately afterwards be paid by the defaulter to the vendor, and in case of non-payment shall be recoverable by the vendor as liquidated damages.

Reservation to purchaser of right to rescind.

15. If the vendor shall fail to show such a title as a Court of Equity would, having regard to the terms of this agreement, oblige the purchaser to accept, or if the vendor shall for any other reason fail to prove his right to enforce as plaintiff the specific performance of this contract, the purchaser shall be entitled to rescind this contract by notice in writing to be given to the vendor or his solicitor, and thereupon the deposit shall be returned to the purchaser, but without any interest or payment to the purchaser of any expenses incurred by him under this contract or other compensation (*t*).

(*s*) See above, p. 86.

(*t*) The following clause is suggested as an alternative. It goes further than the above clause in not merely giving to the purchaser an *option* to rescind the contract, but in modifying the parties' rights and liabilities at common law so as to avoid the injustice done in such cases as *Scott* v. *Alvarez*, 1895, 2 Ch. 603, and similar cases; see above, pp. 37, 70, 83, 189-192; below, Chap. XIX. § 3:—"If the vendor shall fail to show such a title as a Court of Equity would, having regard to the terms of this agreement, oblige the purchaser to accept, or if the vendor shall for any other reason fail to prove his right to enforce as plaintiff the specific performance of this contract, the purchaser shall be entitled at law as well as in equity to rescind or refuse to perform this contract, and the vendor shall not be entitled at law or in equity to claim the deposit as forfeited, or to recover damages for the pur-

SCHEDULE.

[*Containing a detailed description of the property sold and specifying the various tenancies under which the same is occupied.*]

chaser's refusal to perform the contract, or to exercise the power of re-sale hereinbefore reserved to the vendor, and the deposit shall be returned to the purchaser, but without any interest or payment to the purchaser of any expenses incurred by him under this contract or other compensation: but the vendor shall not by reason only of such failure as aforesaid, and unless he would independently of this clause of this agreement be liable at law for a breach of this contract, be liable to pay any damages or other compensation to the purchaser; and subject only to the modification made by this clause of this agreement, either party shall remain liable to the liability imposed on him by the common law for any breach by him of the contract hereby made."

APPENDIX (C).

(*Referred to above,* pp. 163, 167.)

FORM OF INQUIRIES SUPPLEMENTAL TO REQUISITIONS ON TITLE (*a*).

1. Is the property sold let or in hand? If let, the lease or agreement for tenancy must, if in writing, be abstracted and produced; and if the lease or agreement is not in writing its terms must be stated and proved.

2. Are there any tenants' claims or future claims to which the property sold, or any part thereof, or the owner thereof for the time being is or will at the termination of the tenancy be subject, for compensation for improvements, disturbance, damage by game, or in any other respect; and is the vendor or his agent aware of any fact which will give rise to some such claim? If so, please state the nature and extent of such claims, and give particulars of the fact (*b*).

3. Who has lately been and who is now in possession and occupation of such part of the property sold as is in hand, and in receipt of the rents and profits of such part of the property sold as is let (*c*)?

4. Is the property sold, or any part thereof, subject to any easement, profit *à prendre*, or other right, or to any rent-charge, or to any quit rent, heriot or other incident of tenure, or to any public right of way or other public right, or to any liability to repair any road, bridge, sewer, drain, dyke, sea wall or other similar liability? If so, state the particulars.

(*a*) See above, pp. 163-167, 572, 573.
(*b*) See above, pp. 163, 164.
(*c*) See above, pp. 167, 574.

5. What outgoings are there in respect of the property sold? State the particulars.

6. Is the property sold subject to any land improvement or other statutory charge of any kind? Has the vendor or his agent notice or knowledge of any fact (such as a notice or resolution by a local authority of intention to pave, sewer or light the adjoining streets or execute some other improvement or work, or a notice served by some person under some statute, or an order of some court or justice) which will, or may, subject the property sold, or the owner or occupier thereof, to some charge or liability or obligation at some future time?

7. Are any of the boundary walls of the property sold, or any part thereof, party walls? If so, which of them?

8. Have the road, foot-path and sewers abutting on the property sold been taken over by the local authority, and all charges on account thereof paid?

9. Are any wires or cables for telegraph, telephone, electric lighting or other purposes attached to or laid under or over the property sold or any part thereof? If so, are they so attached or laid under some easement or irrevocable agreement, or by revocable licence or permission?

10. Which of the abstracted documents will be delivered to the purchaser on completion? As regards any documents of title which the purchaser is not entitled to require to be so delivered to him, the vendor must procure proper statutory acknowledgments and undertakings to be given to the purchaser by the person or persons who actually retains or retain possession of such documents (*d*).

11. The vendor must, before the date fixed for completion of the purchase, do all that is requisite on his part for enabling the conveyance to be stamped with the Particulars Delivered stamp (*e*).

(*d*) See above, pp. 642, 647.
(*e*) See above, pp. 44, 665-667.

APPENDIX (E).

(Referred to above, p. 55, n. (c).)

SALES OF LAND, WITH TIMBER GROWING THEREON, DURING THE CONTINUANCE OF THE HOME GROWN TIMBER PRICES ORDER, 1918, AND THE TIMBER CONTROL ORDER, 1918.

Maximum prices fixed for sale of standing timber.

THE Home Grown Timber Prices Order, 1918 (*a*), prohibited the sale or purchase, or the offering for sale or purchase, of any timber grown in the United Kingdom at prices exceeding, for timber standing or felled in the wood, those set forth in Schedule A. thereto (*b*). And paragraph 10 of the Timber

(*a*) Made 26th March, 1918, by the Board of Trade under the Defence of the Realm Regulations authorised by the Defence of the Realm Consolidation Act and the Acts amending it (stats. 5 Geo. V. cc. 8, 34, 37, 42); this Order is stated in 62 Sol. J. 442. This Order was revoked, as from the 31st March, 1919, by Order of the Board of Trade dated 5th March, 1919; see 63 Sol. J. 356.

(*b*) This Schedule is as follows:—

SCHEDULE A.

SCHEDULE OF MAXIMUM PRICES FOR STANDING TIMBER.

Prices are per cubic foot, $\frac{1}{4}$ girth, Hoppus measure, tape over bark, with the customary allowance for bark:—

		Per cubic foot. s.	d.
Larch	not exceeding	1	4
Scots Pine and Douglas Fir	,,	0	11
Spruce and other coniferous timber (except the above)	,,	0	10
Ash—selected for aeroplane purposes	,,	5	0
Ash—for other purposes	,,	3	0
Ash—inferior descriptions	,,	1	6
Oak—well-grown, selected trees	,,	3	3
Oak—well-grown, whole parcels	,,	2	3
Oak—inferior descriptions	,,	1	3
Sycamore and Hornbeam	,,	2	0
Chestnut (Spanish)	,,	1	0
Chestnut (Spanish)—selected trees	,,	2	0
Beech	,,	1	6
Poplar, Alder and Lime	,,	1	3
Elm	,,	1	0
Other common hardwoods	,,	1	0

Control Order, 1918 (*c*), required the vendor by private contract of an estate or land with the timber growing thereon, whereof the contents (excluding hedgerow trees) exceeded ten thousand cubic feet, to submit to the Controller of Timber Supplies before completion full particulars concerning the timber thereon at the date of the contract; and made the sale void, so far as it related to the timber thereon, unless a permit was thereupon granted by or on behalf of the Controller.

Timber permit required on sales of land with timber above 10,000 cubic feet in contents thereon.

Paragraph 11 of this Order required the auctioneer or the vendor, where an estate or interest in land with the timber growing thereon, whereof the contents (excluding hedgerow trees) exceeded ten thousand cubic feet, was offered for sale by auction, to submit to the Controller full particulars of the timber, together with a valuation thereof on the basis of Schedule A. of the Home Grown Timber Prices Order, 1918 (*d*); and provided that unless a permit was granted, either to the auctioneer or the vendor, such timber should be excluded from the sale of the land. This paragraph further enacted that a permit granted thereunder might provide that the sale should not be completed as regards the timber unless and until a permit had been granted by or on behalf of the Controller to the person who was declared to be the purchaser; and it required the conditions of sale to provide accordingly. It also required the valuation of the timber to be announced in all cases at the time of sale. The expression "timber" in paragraphs 10 and 11 of this Order included all trees of pit-prop size and over, other than orchard trees (*e*). And infringements of this Order were made summary offences against the Defence of the Realm Regulations (*f*).

Part II. (including paragraphs 6 to 12) of the Timber Control Order, 1918, was revoked by the Timber Control Order

Coniferous timber and Oak and Sycamore of exceptional sizes required for special purposes may be negotiated at proportionate prices, but in such instances sellers must submit particulars to the Controller of Timber Supplies and obtain his approval thereto.

For timber felled and trimmed lying in the wood the above prices may be increased up to 10 per cent.

(*c*) Made 16th July, 1918, by the Board of Trade under the above Regulations, and stated in 62 Sol. J. 705, 706; W. N. 10th Aug. 1918, p. 257.

(*d*) Above, p. 734 and n. (*a*).

(*e*) § 12 of the Order; and see above, p. 60, nn. (*y*), (*c*).

(*f*) § 20 of the Order.

(Amendment No. 2) Order, 1918 (*g*), without prejudice to any act or matter done or suffered, or to any prosecution or proceeding instituted or penalty incurred thereunder.

Effect of the Timber Control Order, 1918.

One effect of the above provisions of the Timber Control Order, 1918, was that during the continuance of the Order it was necessary on sales of land, with timber above ten thousand cubic feet in contents growing thereon, to make special conditions of sale stipulating that, if the required timber permit were not granted, either (if so desired) the entire sale both of land and timber should be void, or else the price to be paid should be reduced by the value of the timber, and the timber, with all necessary powers to enter and fell it, should be excepted and reserved to the vendor upon and in the conveyance of the land sold. Such stipulations ceased to be required after the revocation of the above provisions of the Order. But these provisions had another and a permanent effect, in that production of the timber permit or permits required became necessary to prove that any sale made during the continuance of the Order of standing timber above ten thousand cubic feet in contents, along with the land on which it stood, was lawfully effected. It is thought that, on any subsequent sale or mortgage of such land, which has been conveyed in fulfilment of a contract of sale, made during the continuance of the Order, the purchaser or mortgagee should require production of the timber permit or permits necessary, in order to be satisfied that the sale of the timber was not prohibited. And it is submitted that, on any such subsequent *sale*, the purchaser is *entitled* to make this requisition. For whenever a vendor abstracts any assurance as part of his title, he is bound to prove that all legal formalities necessary to ensure its complete operation (such as registration in Middlesex or Yorkshire (*h*)) have been observed. If the sale, of which the validity is to be established, was made by private contract, the evidence necessary will consist of the timber permit granted thereon (*i*). And if such sale was made by auction, the evidence to be required will consist of the permit to sell granted to the vendor or the auctioneer, and if such permit provided for the issue of a further permit to the purchaser (*k*), then of that permit also.

(*g*) Made 5th Dec. 1918; stated in 63 Sol. J. 138.
(*h*) Above, p. 361. (*i*) Above, p. 735. (*k*) See above, p. 735.

Effect of a conveyance made on completion of a sale contravening the Timber Control Order.

If when such a requisition is made, the timber permit or permits necessary cannot be produced, the counsel or solicitor advising the purchaser or mortgagee must consider what is the effect of a conveyance of land, with timber of the above contents thereon, when executed on completion of a sale made during the continuance of the Timber Control Order without obtaining the permit required. The Order appears to have had the effect of a statutory prohibition (*l*) of the sale of standing timber of the above contents without complying therewith: but it did not prohibit the sale of the land on which the timber was growing, nor did it expressly except the timber from a conveyance of the land made in pursuance of a sale contravening the Order. The question arises, therefore, whether the provisions of the Order (*m*) can be construed as impliedly excepting the timber from a conveyance executed on a sale made in contravention of the Order; or whether the case is governed by the general law relating to a conveyance made in fulfilment of an illegal contract. In the latter alternative it appears that the conveyance would not be inoperative as regards the timber, but would take effect as against the vendor according to its purport. On the face of the conveyance, therefore, the timber would pass as part of the land conveyed (*n*); and neither the timber so conveyed, nor the price paid for it, could be recovered back (*o*). It is thought that the case of a conveyance in completion of a sale made in contravention of the Timber Control Order is certainly not stronger than, if so strong as, that of a conveyance on a sale made by way of lottery, which is expressly prohibited and made void by statute (*p*). If so, then even if the Order did have the effect of excepting the timber to the vendor upon the conveyance of the land, it does not appear that the vendor or anyone claiming under him could take any active legal proceedings to recover possession of the timber. For the Timber Control Order was made, not for the protection of owners of standing timber, but in the public interest; and that being so, the law would not permit the vendor, or anyone claiming under him, to allege the vendor's own wrong in selling the timber without the required permit. He could not therefore effectually take any proceedings as plaintiff to get possession

(*l*) See above, p. 735. (*m*) Above, p. 735.
(*n*) *Herlakenden's Case*, 4 Rep. 62 a; *Liford's Case*, 11 Rep. 46 b, 48 a; *Inland Revenue Commrs.* v. *Smyth*, 1914, 3 K. B. 406, 418, 419.
(*o*) See below, Chap. XV. (*p*) See below, Chap. XV.

of the timber in question, which would on the face of the conveyance have passed, as part of the land conveyed, to the grantee thereunder (*q*).

It may be objected that, if the effect of a conveyance on a sale made in contravention of the Timber Control Order is as above suggested, it is not necessary to make any requisition for production of the timber permit. But the question of the effect of such a conveyance remains open until the point shall have been expressly decided. And it is thought that in any case the purchaser is entitled in the first instance to require, and the vendor is bound to furnish if he can, proof that a sale made during the continuance of the Timber Control Order of land, with timber above ten thousand cubic feet thereon, was in all respects lawfully effected. If such proof cannot be furnished, then, and then only, it is thought, is the subsequent vendor at liberty to put forward the consideration that the conveyance to himself, or his predecessor, was valid and irrevocable, even if the provisions of the Timber Control Order were not complied with. The case is like that of requiring proof of the due discharge of succession or estate duty charged on the land sold by reason of some death which occurred twelve years or upwards before the sale (*r*).

It has been mentioned (*s*) that the Home Grown Timber Prices Order, 1918 (*t*) appears to have had the effect of prohibiting the sale, at prices exceeding those thereby fixed, of standing timber, when sold together with the land on which it is growing, but at a price to be fixed by valuation in addition to the price to be paid for the land. It is thought that a conveyance of land in completion of a sale made in contravention of this Order is governed by the general law relating to conveyances made in fulfilment of an illegal contract; and that the timber would pass as part of the land by the conveyance, and could not be recovered by the grantor (*u*).

(*q*) See *Doe* d. *Roberts* v. *Roberts*, 2 B. & A. 367; below, Chap. XV.; and an article by the author in 63 Sol. J. 315.
(*r*) See below, Chap. XXI. §§ 2, 3. (*s*) Above, p. 55, n. (*c*).
(*t*) Above, p. 734. (*u*) Above, p. 737; below, Chap. XV.

END OF FIRST VOLUME.

MIDDLE
TEMPLE